

# INDIANA LAW REVIEW

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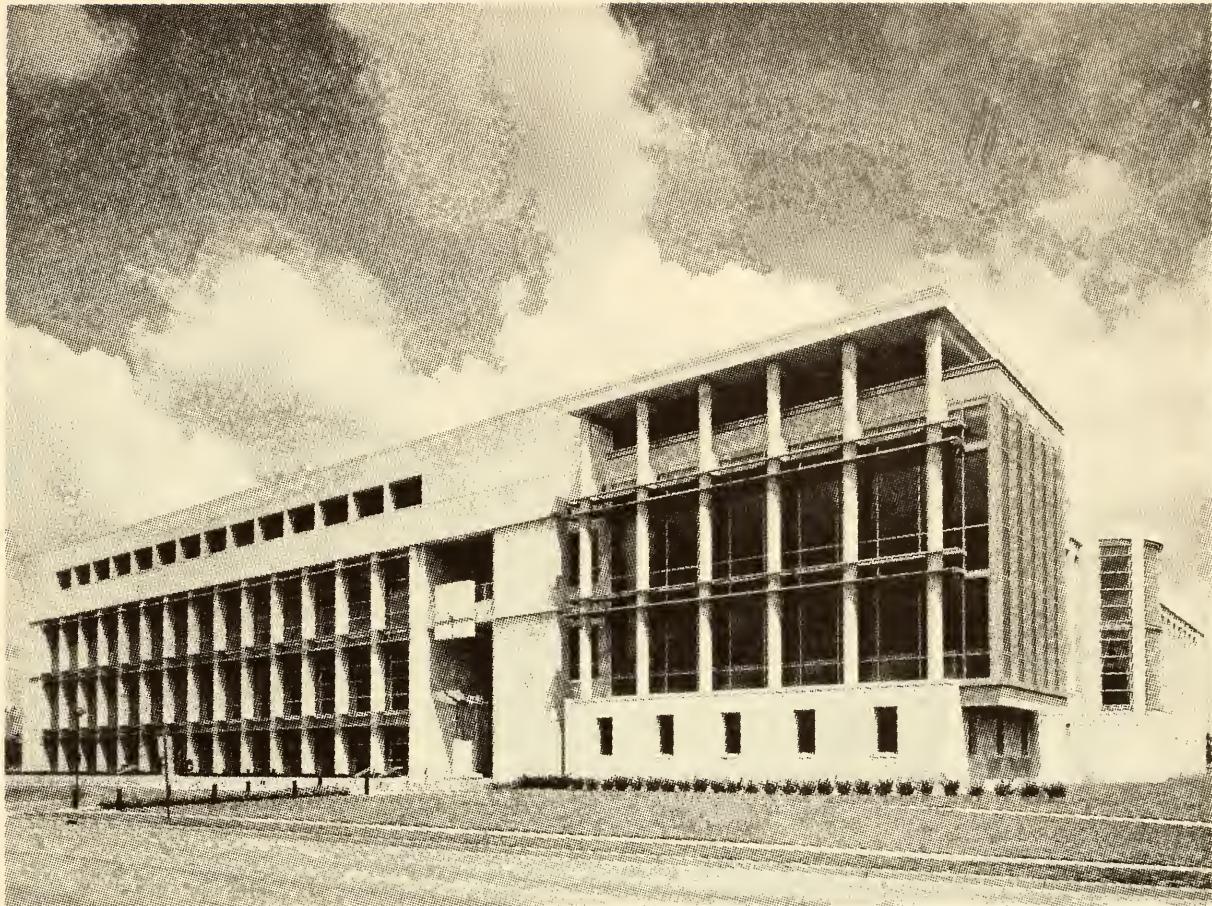
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## SYMPOSIUM THE FAIR HOUSING ACT AFTER 40 YEARS: CONTINUING THE MISSION TO ELIMINATE HOUSING DISCRIMINATION AND SEGREGATION

### LIVING TOGETHER: ENDING RACIAL DISCRIMINATION AND SEGREGATION IN HOUSING

FLORENCE WAGMAN ROISMAN\*

There is no such thing as the State  
And no one exists alone;  
Hunger allows no choice  
To the citizen or the police;  
We must love one another or die.<sup>1</sup>

W.H. Auden

This year marks the fortieth anniversary of three major events with respect to residential racial discrimination and segregation in the United States: the enactment of the “comprehensive” Federal Fair Housing Act of 1968, the Supreme Court’s holding that the 1866 Civil Rights Act prohibits racial discrimination in the sale and rental of property even where there is no state action, and the assassination of the Reverend Dr. Martin Luther King, Jr.<sup>2</sup>

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\* William F. Harvey Professor of Law, Indiana University School of Law—Indianapolis. We all are profoundly indebted, and I personally am extremely grateful, to Elizabeth Ellis, Symposium Editor of the *Indiana Law Review*, for her meticulous, long-term, effective work on this volume and live Symposium. I thank also librarian Richard Humphrey; faculty assistant Mary Ruth Deer; Keith Berlin, the Editor-in-Chief of the *Indiana Law Review*; Executive Articles Editor Oni Sharpe; Volume 42 Symposium Editor Ellen Hurley; and Editorial Specialist Chris Paynter.

This Article is dedicated to my beloved granddaughter, Cassandra Julieann Roisman, with the ardent hope that she and her contemporaries will mature in a much more just, peaceful, and civilized world than that into which they were born.

1. W.H. Auden, *September 1, 1939*, in *ANOTHER TIME: POEMS BY W.H. AUDEN* 112, 114 (1940). Cf. EDWARD MENDELSON, *EARLY AUDEN* 325-26 (1981) (stating that Auden later omitted this stanza from his collected poetry and still later changed the last line to “We must love one another and die”).

2. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (2000); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that the Civil Rights Act of 1866, now codified in part at 42 U.S.C. § 1982, applies to private as well as public discrimination on the basis

Although the 1968 Fair Housing Act has prohibited residential racial discrimination and segregation for forty years, and the 1866 Act has prohibited them for more than a century, the United States still is characterized by substantial racial discrimination with respect to the sale, rental, and occupancy of housing and by pervasive racial residential segregation.<sup>3</sup> Recognizing this, the *Indiana Law Review* determined to devote its 2008 Symposium Issue to exploring this matter. The editors invited some of the leading scholars and practitioners in the field to contribute papers and to participate in a live discussion on April 3-4, 2008. We were honored that Theodore Shaw, retiring as Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. and now a professor at Columbia Law School, agreed to open the Symposium with a keynote address and close it with his vision of the future in a “Post-Affirmative Action America.” We also were honored by the willingness of other distinguished researchers, academics, and practitioners to write for this Issue. Most, though not all, were able also to present their papers in April.<sup>4</sup>

Professor Monroe H. Little, Jr. sets the context for the Symposium with his perceptive tribute to Dr. King. Professor Little writes that Dr. King “has been reduced to a mere dreamer” who allegedly advocated a color-blind society, a “one-dimensional caricature of the real King” who fought against war, white privilege, and economic injustice.<sup>5</sup> Professor Little reminds us that the real Dr. Martin Luther King, Jr. admonished that “[a] society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis.”<sup>6</sup> He renews Dr. King’s urging that whites “reject[] . . . white privilege and the normed inequities of the white polity . . . [to] be able to stand together with non-whites in speaking out, struggling against and dismantling the politicoeconomic system of white supremacy” that perpetuates racial discrimination and segregation with respect to housing and all other resources and services.<sup>7</sup>

One point is common ground for the participants in this Symposium: all

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of race); JULES WITCOVER, *THE YEAR THE DREAM DIED: REVISITING 1968 IN AMERICA* 152-53 (1997).

3. See generally JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 719 (2008).

4. Those who presented are: Michael Allen, Jeannine Bell, Elizabeth K. Julian, James A. Kushner, John A. Powell, John P. Relman, Florence Wagman Roisman, James E. Rosenbaum, Robert G. Schwemm, and Margery Austin Turner. Those who contributed to this Issue, but were unable to participate in April are: Leonard Rubinowitz, Kathryn Shelton, and Stefanie DeLuca.

5. Monroe H. Little, Jr., *More Than a Dreamer: Remembering Dr. Martin Luther King, Jr.*, 41 IND. L. REV. 523, 524 (2008).

6. *Id.* at 536 (quoting MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 105-06 (Bantam Books 1968) (1967)).

7. *Id.*

agree that the Fair Housing Act was intended to end both discrimination and segregation and has not been fully successful in either respect.<sup>8</sup> Margery Austin Turner summarizes the most recent evidence on these topics, showing (among other things) that there still is substantial discrimination against minorities seeking to acquire housing, mortgage loans, and home insurance, and that levels of racial and economic segregation continue to be high, especially in large urban areas with large minority populations.<sup>9</sup> John Powell emphasizes one especially shocking result of the studies: that a particular form of discrimination, steering, “does not appear to have decreased since tougher fair housing” enforcement requirements were imposed by the Fair Housing Amendments Act of 1988.<sup>10</sup> “In fact,” he writes, “the incidence of Black/White segregation steering appears to have increased.”<sup>11</sup> Jeannine Bell provides a chilling discussion of both old and recent cases in which whites used violence to prevent minorities from living in neighborhoods that whites had claimed as their own.<sup>12</sup>

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8. Although the statute does not use the word “integration,” the Supreme Court has said, and other courts and commentators generally agree, that one of the goals of the statute was integration. *See, e.g.*, *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) (stating that the actionable “wrong committed by HUD confined the respondents to segregated public housing”); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (adopting the statement of Senator Walter Mondale, a drafter of the legislation, that “the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns’” (quoting 114 Cong. Rec. 3422 (1968)); Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 559 (2008); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 615 (2008) (noting that the goals of integration and anti-discrimination may sometimes conflict); Robert G. Schwemmm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 717-19 (2008) [hereinafter Schwemmm, *Discriminatory Municipal Services*]; Turner, *supra* note 3, at 814-15.

9. Turner, *supra* note 3, at 800-03; *see also* Julian, *supra* note 8, at 555-59; Powell, *supra* note 8, at 620-27.

10. Powell, *supra* note 8, at 613 (quoting George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLANN. ASS’N 251, 253 (2005)); *see also* Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619.

11. Powell, *supra* note 8, at 613 (quoting Galster & Godfrey, *supra* note 10, at 253); accord Turner, *supra* note 3, at 803-06.

12. *See generally* Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537 (2008). Note in this connection Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 206, 209 (John F. Bauman et al. eds., 2000) (quoting GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944) for the proposition that New Deal programs extended “protection” to areas and groups of white people who were earlier without it” and stating that “[t]he result was that the emergent sense of entitlement that appeared after World War II embraced not merely the fact of property ownership, but a broader conception of homeowners’ rights that included the assumption of a racially exclusive neighborhood”); *see also* JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM passim* (2005); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* 209-58

Given that the goals of the statute have not been achieved, the obvious questions are: Why not? and What can we do to improve the situation? To what extent and in what ways do we need improved enforcement of the Fair Housing Act? To what extent and in what ways do we need changes in judicial interpretation of the Act? To what extent and in what ways do we need legislative changes in the Act itself? What other kinds of changes are required if we are to eliminate residential racial discrimination and segregation in the United States?

Our contributors provide a basis for answering these questions. They consider the creation of the Fair Housing Act, the inevitable political compromises that marked its enactment, and the consequences of those agreements. They offer a menu of suggested improvements in the battle for truly fair and open housing and access to opportunities.

We begin with an exploration of the relationship between the enactment of Title VIII and the Chicago Freedom Movement (“CFM”) of which Dr. King was a leader.<sup>13</sup> Leonard Rubinowitz and Kathryn Shelton conclude that while reactions to the CFM probably contributed to the defeat of federal fair housing legislation in 1966, the CFM—and Dr. King’s assassination—may well have helped to persuade Congress to enact such legislation in 1968.<sup>14</sup> The analysis of this legislative activity should inform proposals to amend the Fair Housing Act now.<sup>15</sup>

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(1996).

13. Leonard S. Rubinowitz & Kathryn Shelton, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663, 663-64 (2008); see also Julian, *supra* note 8, at 559 (suggesting that “the difficult compromises involved in securing” the adoption of Title VIII may have caused its relative ineffectiveness); Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 756-78 (providing an analysis of the legislative history of the statute, particularly with regard to the two issues Professor Schwemm addresses).

14. See generally Rubinowitz & Shelton, *supra* note 13. It also is reasonable to infer that Dr. King’s assassination and the riots it caused significantly influenced the Supreme Court in its decision in *Jones v. Alfred H. Mayer Co.*, reinterpreting the 1866 Civil Rights Act to apply to private action. See THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 731 (Del Dickson ed., 2001) (referring to the decision as “[a] dramatic reinterpretation of § 1982”); *id.* at 729 (noting that the Justices’ first discussion of the case in conference took place on the day after Dr. King’s assassination and stating that “[a]s the Justices deliberated, much of Washington, D.C., was beset by violent race riots”). The case was decided on June 17, 1968, less than two weeks after the June 5 shooting and June 6 death of presidential candidate Robert F. Kennedy. WITCOVER, *supra* note 2, at 259. The Supreme Court’s conferences on the case, however, were held on April 5 and April 19, before the murder of Senator Kennedy. THE SUPREME COURT IN CONFERENCE, *supra*, at 729-30.

15. See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 360-63 (2007) (discussing the legislative history of the 1968 Act); Mara S.

One of the principal problems with enforcement of the Act, identified by several participants, has been the fair housing movement's "relatively singular focus . . . on individual acts of discrimination."<sup>16</sup> Margery Austin Turner, for example, reviews studies of knowledge and exercise of fair housing rights.<sup>17</sup> She reports that most people seem to know what rights are established by fair housing laws, but "most people who experience discrimination fail to act."<sup>18</sup> "Only 1% of the people who believed that they experienced discrimination went to a fair housing group; 1% filed a complaint with a government agency; and 2% consulted a lawyer."<sup>19</sup> Most of these people thought that complaining "would not have been worth the effort . . . or . . . would not have helped" much.<sup>20</sup>

Such findings as these show that reliance on individual complaints cannot be expected to lead to the elimination of residential racial discrimination and segregation.<sup>21</sup> Turner prescribes more enforcement that does not rely on complaints from individuals, such as increased government funding for "proactive paired testing" of housing providers, lenders, brokers, and insurance providers.<sup>22</sup> Similarly, john powell urges the Department of Justice to increase testing, "pattern or practice" claims, and all forms of housing enforcement, noting that in recent years the Department of Justice has filed far fewer cases than in the past.<sup>23</sup> Others have proposed structural changes in the statute.<sup>24</sup>

Robert Schwemm, John Relman, and john powell address judicial enforcement of the Fair Housing Act.<sup>25</sup> As Professor Schwemm reminds us,

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Sidney, *Images of Race, Class, and Markets: Rethinking the Origin of U.S. Fair Housing Policy*, 13 J. POL'Y HIST. 181 (2001).

16. Julian, *supra* note 8, at 559.

17. Turner, *supra* note 3, at 803-06.

18. *Id.* at 805.

19. *Id.* at 806 (citing MARTIN D. ABRAVANEL, U.S. DEP'T OF HOUS. & URBAN DEV., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW 36 (2006)).

20. *Id.* (citing ABRAVANEL, *supra* note 19, at 36-37); *see also* TOI DERRICOTTE, THE BLACK NOTEBOOKS 67 (1997) (describing the decision of sophisticated victims of discrimination not to challenge it).

21. *See* John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1585 (1993) (noting that "experience [with other civil rights laws] has shown that effective compliance strategies cannot rely upon the punishment of individual acts of misconduct. Instead they require the design of affirmative, system-wide remedies").

22. Turner, *supra* note 3, at 814-15.

23. powell, *supra* note 8, at 616; *cf.* James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 596-97 (2008) (noting that "Title VIII . . . never received administrative and enforcement leadership or adequate funding").

24. *See* Boger, *supra* note 21, at 1601-15 (proposing a federal "fair share" plan to promote residential racial integration).

25. *See* Schwemm, *Discriminatory Municipal Services*, *supra* note 8; John P. Relman,

although the Supreme Court in the past admonished that the Fair Housing Act implements “a ‘policy that Congress considered to be of the highest priority,’ and that [the Act] should be given a ‘generous construction,’”<sup>26</sup> some post-1968 presidents have appointed to the federal bench many who are not proponents of civil rights, so that “the modern federal judiciary has grown so hostile to civil rights that decisions narrowing the coverage of the Nation’s anti-discrimination laws have become the norm.”<sup>27</sup>

Against this background, Professor Schwemm analyzes two important issues being re-interpreted by conservative federal courts. The first issue is whether homeowners in a predominantly Black neighborhood may maintain claims under the Fair Housing Act if municipal services provided to them are grossly inferior to the services provided to white neighborhoods.<sup>28</sup> The Fifth Circuit held in *Cox v. City of Dallas, Texas*<sup>29</sup> that such suits may not be maintained under the Fair Housing Act, except perhaps where the lack of services constitutes constructive eviction.<sup>30</sup> The second issue is broader—whether people already in their homes, as distinguished from people who are seeking homes, ever have claims cognizable under the Fair Housing Act.<sup>31</sup> In *Halprin v. Prairie Single Family Homes of Dearborne Park Ass’n*,<sup>32</sup> the Seventh Circuit held that they do not.<sup>33</sup> Professor Schwemm, after a detailed examination of other cases involving these issues and the language, legislative history, and administrative interpretation of the 1968 Act, concludes that the analyses in *Cox* and *Halprin* “are so flawed—and . . . have so misconstrued § 3604(b) of the [Fair Housing Act]—that they should be rejected by other federal and state courts.”<sup>34</sup>

Both John Relman and John Powell write about the application of fair housing principles to the predatory lending crisis.<sup>35</sup> Relman urges the use of “creative litigation strategies to break down barriers to spatial and racial mobility, and shore up transitional minority neighborhoods struggling to hang on

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*Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629 (2008); Powell, *supra* note 8, at 615-16.

26. Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 720 n.11 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-12 (1972)).

27. *Id.* at 720; see also Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1600 (2003) (making the same point about the federal judiciary with respect to school desegregation cases).

28. See generally Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

29. 430 F.3d 734, 746 (5th Cir. 2005), cert. denied, 547 U.S. 1130 (2006).

30. See generally Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

31. See generally *id.*

32. 308 F.3d 327 (7th Cir. 2004).

33. *Id.* at 330.

34. Schwemm, *Discriminatory Municipal Services*, *supra* note 8, at 795; see also Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 215-22 (2006).

35. Relman, *supra* note 25, at 629-32; Powell, *supra* note 8, at 620-27.

in the face of rising foreclosures.”<sup>36</sup> His article focuses on litigation in which he represents the Mayor and City Council of Baltimore, Maryland, in a suit challenging a major lender “for targeting [Baltimore’s] minority communities for discriminatory lending practices that [Baltimore] alleges have resulted in unnecessarily high rates of foreclosure.”<sup>37</sup> powell writes about both the Baltimore suit and litigation in Cleveland that invokes public nuisance doctrine against those it charges with responsibility for the foreclosure crisis in that city.<sup>38</sup> powell’s article discusses the background to and theory of the suit and concludes with consideration of “the implications that the remedies sought by Baltimore have for the broader struggle to promote integration.”<sup>39</sup>

The “broader struggle to promote integration” provides the basis for substantial and important discussion among the contributors. Several write about the importance of achieving both racial and economic integration. Margery Austin Turner reports on recent studies that show that residential segregation severely limits access to economic opportunity with respect to employment, education, and home values.<sup>40</sup> The merits of residential racial and economic integration are documented also by James E. Rosenbaum and Stefanie DeLuca, who discuss some of the lessons to be learned from two major programs that have allowed poor families of color to move to neighborhoods with less poverty—the *Gautreaux* Housing Mobility Program and the Federal Moving to Opportunity (“MTO”) experiment.<sup>41</sup>

The *Gautreaux* program enabled poor, Black families living in or eligible for Chicago public housing to move to predominantly white, suburban communities outside Chicago where schools, employment opportunities, and safety were much better than in city neighborhoods.<sup>42</sup> MTO allowed some public housing families to move to areas with less poverty, though the areas still might be predominantly minority. Many of the MTO children attended “schools in the same school district (often the same schools), and even when they changed schools, the new schools were not much better than the original schools.”<sup>43</sup> Continuing more than

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36. Relman, *supra* note 25, at 630.

37. *Id.* (citing Complaint for Declaratory and Injunctive Relief and Damages ¶ 6, Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., No. 1:08-cv-062-BEL (D. Md. filed Jan. 8, 2008), 2008 WL 117894)).

38. powell, *supra* note 8, at 620-27.

39. *Id.*

40. Turner, *supra* note 3, at 809-13 (noting, *inter alia*, that “high levels of segregation have been shown to increase high school drop-out rates among blacks, reduce employment among blacks . . . , and widen the gap between black and white wages”).

41. *See generally* James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility Programs*, 41 IND. L. REV. 653 (2008).

42. *Id.* at 654; *see also* powell, *supra* note 8, at 616-17 (stating that there no longer is a clear division between suburbs with high opportunities and central cities with low opportunities, because more poor people live in the suburbs than in the cities).

43. Rosenbaum & DeLuca, *supra* note 41, at 660. For more information about MTO, see

two decades of research, Rosenbaum and DeLuca describe both quantitative and qualitative studies, concluding that “[t]he *Gautreaux* findings suggest that it is possible for low-income black families to make permanent escapes from neighborhoods with concentrated racial segregation, crime, and poverty and that these moves are associated with large significant gains in education, employment, and racially integrated friendships, particularly for children.”<sup>44</sup> They also describe research they believe should be undertaken to explore further the possibilities of these housing mobility programs.<sup>45</sup> That the results of MTO were less encouraging than the results of the *Gautreaux* program strongly suggests the importance of using race-conscious remedies. As Justice Blackmun wrote in 1978, “[T]o get beyond racism, we must first take account of race.”<sup>46</sup> Betsy Julian criticizes the use of MTO research “to argue against policies that support racial and economic integration”<sup>47</sup> and states that this use of the research “reflects less a policy concern that housing mobility will not succeed than a political concern that it will.”<sup>48</sup>

These articles make a strong case for the development of more housing mobility programs designed to promote racial as well as economic integration. Margery Austin Turner builds on this by recommending specific incentives for pro-integrative moves, including downpayment assistance, low-interest loans, equity insurance, and improvements for schools, police protection, and recreational and other facilities in integrated neighborhoods.<sup>49</sup> In this vein, several participants discuss the importance of applying fair housing principles in the implementation of particular public programs that in the past have created

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generally John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 127 (Xavier de Souza Briggs ed., 2005) [hereinafter *THE GEOGRAPHY OF OPPORTUNITY*].

44. Rosenbaum & DeLuca, *supra* note 41, at 662. Accord Julian, *supra* note 8, at 563-65; *see also, e.g.*, LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 83-172 (2000); James Rosenbaum et al., *Can the Kerner Commission’s Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519 (1993); James E. Rosenbaum et al., *Low-Income Black Children in White Suburban Schools: A Study of School and Student Responses*, 56 J. NEGRO EDUC. 35, 35-43 (1987); James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 43, at 150, 156-70. For citations to other research reports on the *Gautreaux* program, see Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 507-08 (1995) (book review); *see generally* with respect to the *Gautreaux* litigation, ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* (2006).

45. Rosenbaum & DeLuca, *supra* note 41, at 661-62.

46. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

47. Julian, *supra* note 8, at 563.

48. *Id.* at 564.

49. Turner, *supra* note 3, at 815-16.

and perpetuated discrimination and segregation, including “federal homeownership assistance, public housing, urban renewal, and exclusionary zoning and land use regulations.”<sup>50</sup> Julian writes about the HOPE VI public housing program, which has been used to exacerbate racial segregation, and urges that it be redesigned to satisfy the statutory directive that HUD “affirmatively further” the purposes of the Fair Housing Act.<sup>51</sup> Both she and John Powell focus on the Low Income Housing Tax Credit (“LIHTC”) program, administered by the Treasury Department and state housing finance agencies, urging that it be administered in a way that promotes residential desegregation.<sup>52</sup> Julian also discusses the importance of land use regulation as a tool of racial exclusion.<sup>53</sup> To redress the segregatory effect of past zoning and other land use strictures, and to turn such controls into tools for residential integration, we must look to federal and state rather than local governance of land use, so that decisions are made on the basis of the general welfare rather than on the basis of the perceived welfare of a small, self-centered community.<sup>54</sup> Inclusionary zoning ordinances hold much promise as tools for promoting economic and racial inclusion.<sup>55</sup>

Two articles provide broad visions of the past forty years and proposals for the future. In one, James Kushner surveys urban evolution in the United States from 1945 through 2008, identifying four past phases, the most recent (1990-2008) characterized by the hypersegregation<sup>56</sup> named by Douglas Massey and Nancy Denton in their seminal book, *American Apartheid*.<sup>57</sup> Kushner hypothesizes that the United States may be entering a fifth phase of “Smart

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50. *Id.* at 807 n.66.

51. Fair Housing Act, 42 U.S.C. §§ 3608(d), 3608(e)(5) (2000); Julian, *supra* note 8, at 566-69; see Roisman, *supra* note 15, at 353-68 (discussing the meaning of the “affirmatively further” obligation).

52. Julian, *supra* note 8, at 569-71; see also Powell, *supra* note 8, at 618-20; Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747 (2005); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

53. Julian, *supra* note 8, at 571-73; see also Kushner, *supra* note 23, at 602 (noting that “traditional urban planning and land regulation have rendered the nation more segregated by race, ethnicity, and class”); Powell, *supra* note 8, at 614 (discussing exclusionary zoning).

54. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (“It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 95-98 (2001).

55. Kushner, *supra* note 23, at 597-603; see, e.g., Valerie Feldman, *Local Land-Use Advocacy: Inclusionary Zoning to Achieve Economic and Racial Integration*, 42 CLEARINGHOUSE REV. 61 (2008).

56. See generally Kushner, *supra* note 23.

57. MASSEY & DENTON, *supra* note 3.

Growth.”<sup>58</sup> Kushner, while emphasizing that he “remains an unadulterated integrationist,”<sup>59</sup> identifies three developments that he says provide “reason to question the value of integration and diversity in contemporary American culture.”<sup>60</sup> These are (1) a study showing that some Black people prefer neighborhoods in which other Black people live,<sup>61</sup> (2) a study by Edward Glaeser and Joseph Gyourko suggesting “that greater ethnic diversity in the United States is the reason for significantly lower social welfare spending in America as compared to Europe,”<sup>62</sup> and (3) reports about recent research by Professor Robert Putnam, who writes that “[i]n the short to medium run, . . . immigration and ethnic diversity challenge social solidarity and inhibit social capital.”<sup>63</sup>

In the other article, Betsy Julian takes us back to the 1968 Kerner Commission report, whose “basic conclusion” was that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”<sup>64</sup> The Commission warned that “[t]o continue present policies is to make permanent the division of our country into two societies; one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying areas.”<sup>65</sup> Responding to the concerns expressed by the Kerner Commission, the Fair Housing Act was designed to undo racial and economic segregation and “to address the twin evils of Jim Crow: separate and unequal.”<sup>66</sup> That effort produced two movements, she writes—fair housing and community development—but each came to focus on only one of the evils and therefore ended by perpetuating both.<sup>67</sup> Her call is for “advocates from the fair housing and community development movements [to] overcome their longstanding divide” in order to end both evils at which the Kerner Commission Report and the Fair Housing Act were aimed.<sup>68</sup>

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58. Kushner, *supra* note 23, at 597-601.

59. *Id.* at 599.

60. *Id.*

61. Patrick J. Bayer et al., *A Unified Framework for Measuring Preferences for Schools and Neighborhood*, 115 J. POL. ECON. 588 (2007).

62. Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Working Paper No. 1948, 2002), <http://www.economics.harvard.edu/pub/hier/2002/HIER1948.pdf>.

63. Kushner, *supra* note 23, at 600 (citing Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds that Diversity Hurts Civil Life. What Happens When a Liberal Scholar Unearthed an Inconvenient Truth?*, BOSTON GLOBE, Aug. 5, 2007, at D1); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137, 138 (2007).

64. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) (commonly known as the Kerner Commission Report). The Commission was appointed by President Johnson in 1967 to investigate the causes of civil disorders.

65. *Id.* at 22.

66. Julian, *supra* note 8, at 558.

67. *Id.* at 557-58.

68. *Id.* at 565.

As Julian details, the struggle for racial and economic integration has been “both socially uncomfortable and politically difficult,” leading many to seek to avoid it.<sup>69</sup> She points out that current legal and academic developments have “reinvigorated those who would argue that the goal of an integrated society is utopian at best and undesirable or even illegal at worst.”<sup>70</sup> She refers principally to the Supreme Court’s decision in the Seattle and Louisville voluntary integration cases,<sup>71</sup> to the use of MTO research results to cast doubt on the successes of *Gautreaux*, and to commentary about Professor Putnam’s research.<sup>72</sup>

The anti-integration attacks cited by Kushner and Julian focus our attention on a fundamental problem with achieving the goals of the Fair Housing Act: that many people who possess—or perceive that they possess—power and privilege do not support any action they fear might reduce their power and privilege. As Margery Austin Turner reports, “considerable evidence suggests that the fears of white people perpetuate neighborhood segregation,” the fears being “that an influx of minorities into their neighborhood will inevitably lead to a downward spiral of declining property values, rising crime, and white flight.”<sup>73</sup>

There are dispositive responses to each of the anti-integration arguments cited by Kushner and Julian. As to “Black preference,” while there is no doubt that some Blacks demonstrate a preference for neighborhoods with significant Black occupancy, it also still is true that, as Kenneth Clark noted decades ago, because Blacks well know that they will meet hostility in many white neighborhoods, no study can show what Blacks would choose if they were truly free to make a choice.<sup>74</sup> Moreover, virtually all studies agree that Black choice

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69. *Id.* at 556.

70. *Id.* at 561.

71. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

72. Julian, *supra* note 8, at 561 (discussing *Parents Involved in Cmty. Schs.*, 127 S. Ct. 2738); *id.* at 563-65 (discussing MTO and *Gautreaux*); *id.* at 562 (discussing Putnam’s research).

73. Turner, *supra* 3, at 814.

74. See KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 234 (1965) (stating that “many liberal whites believe that Negroes prefer to live together. . . . No one will ever, in fact, know whether Negro culture *does* bind its members together until Negroes have the freedom others have to live anywhere”); accord SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 17 (2004) (“Knowing the history of discrimination and hostility against them, it is not surprising that many blacks would consider an overwhelmingly black neighborhood more attractive than an overwhelmingly white one.”); Sheryll Cashin, *Dilemma of Place and Suburbanization of the Black Middle Class*, in THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE 87, 89 (Robert D. Bullard ed., 2007) (stating that middle-class Black families “are frequently forced to choose between a black enclave that comes with some costs but provides a spirit-reviving balm against the stress of living as a black person in America, or a community that offers a wealth of opportunities and benefits but where they would be vastly outnumbered by whites, a kind of integration they may not want” (footnotes omitted)); *see also* Bell, *supra* note 12, *passim*; John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-The-Future Essay*, 71 N.C. L. REV. 1487, 1492 (1993) (“offer[ing] a critique of residential integration as tokenistic,

is a relatively small part of the explanation for residential racial segregation.<sup>75</sup>

As to the point that the goal of racial integration reduces the amount of money spent on social programs, this is not a surprise; indeed, it is part of the problem for which integration is a solution. As Betsy Julian writes, the white majority in the United States long has offered a deal with the Devil—if advocates for social justice want resources devoted to social programs, they will have to allow those programs to be racially separate. But history and social science show that separate is inherently unequal with respect to housing, healthcare, recreation, and the environment—with respect to everything, not simply with respect to education.<sup>76</sup> This is precisely why Julian urges that those concerned with improving the housing and neighborhood conditions of Blacks and other minorities insist upon recognition that the origins of and solutions for those problems lie in race consciousness.<sup>77</sup>

The story of the reports about the Putnam research provides a particularly important object lesson for us. The Putnam research is about diversity created by immigration, not by racial difference, and its methodology and conclusions, though only preliminary, have been the subject of significant criticism.<sup>78</sup> Robert

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gradualistic, and subordinating"); Julian, *supra* note 8, at 560 (noting that the goal of integration always has been undermined not only by hostile whites but also by people of color who "rightly found offensive any notion that they must live among whites to be able to access equal opportunity"); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937 (2002) (finding that the preferences of Blacks "are driven not by solidarity or neutral ethnocentrism but by fears of white hostility"); *see also* discussion of steering, *supra* p. 509.

75. See Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004) (stating that while "[t]here is new evidence to support the existence of self-segregation among blacks . . . , this effect appears smaller than the effect of self-segregation among whites"). For earlier authority for the proposition that residential segregation is not generally the result of Black preference, see Roisman, *supra* note 44, at 487-88 n.47.

76. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954); MASSEY & DENTON, *supra* note 3; Turner, *supra* note 3.

77. See Julian, *supra* note 8, at 559 n.22 (explaining that this was why liberals in 1949 "preserved" the public housing program by allowing it to be racially segregated); *see generally* with respect to other social welfare programs, IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005); ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

78. Casey J. Dawkins, *Reflections on Diversity and Social Capital: A Critique of Robert D. Putnam's "E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture,"* 19 HOUSING POL'Y DEBATE 208 (2008) (criticizing "methodological and conceptual limitations of the study"); *see also* BARBARA ARNEIL, *DIVERSE COMMUNITIES: THE PROBLEM WITH SOCIAL CAPITAL* (2006) (suggesting that what has been perceived as increased division and distrust has led to increased justice for women and cultural minorities). An important

Putnam himself has emphasized that “[i]ncreased immigration and diversity are not only inevitable, but over the long run they are also desirable. Ethnic diversity is, on balance, an important social asset . . .”<sup>79</sup> He cautions that “[i]t would be unfortunate if a politically correct progressivism were to deny the reality of the challenge to social solidarity posed by diversity. It would be equally unfortunate if an ahistorical and ethnocentric conservatism were to deny that addressing that challenge is both feasible and desirable.”<sup>80</sup>

Nonetheless, precisely what Professor Putnam has warned against has happened: his article has been seized upon as a purported justification for rejecting the goal of integration. David Brooks wrote in the *New York Times*: “[I]t could be the dream of integration itself is the problem. It could be that it was like the dream of early Communism—a nice dream, but not fit for the way people really are.”<sup>81</sup> And David Brooks is not alone. As Professor Kushner reported, other “opinion makers” used the Putnam article as a basis for challenging the goal of integration.<sup>82</sup> The *New York Times Magazine* recently gave more credence to this idea, citing the Putnam research and reporting the suggestion “that living in close proximity to other races—sharing industries and schools and sports arenas—actually makes Americans less sanguine about racial harmony rather than more so.”<sup>83</sup>

This campaign against integration is not an accident. The identification of integration with Communism is not an accident. These articles all reflect a broad-ranging attack on the goals of integration, an attack in every forum—courts, legislatures, agencies, media, and, most importantly, the public mind. David Brooks speaks for this campaign when he writes: “[M]aybe integration is not in the cards. Maybe the world will be as it’s always been, a collection of insular compartments whose fractious tendencies are only kept in check [sic] by constant maintenance.”<sup>84</sup>

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forthcoming book by Sheila Suess Kennedy analyzes the Putnam findings and questions their persuasiveness. *SHEILA SUESS KENNEDY, DISTRUST, AMERICAN STYLE: DIVERSITY AND OUR CRISIS OF PUBLIC CONFIDENCE* (forthcoming 2009) (manuscript on file with *Indiana Law Review*) (citing other critical analyses of Putnam’s thesis and pointing out, *inter alia*, that the fact that increased diversity and decreased trust may have occurred at the same time certainly does not prove that one causes the other; that the vast array of trust-depleting events in the United States suggests that trust would have diminished regardless what happened with respect to diversity; and that “trust” is not the most important quality for us to seek, our democracy being founded not on trust but on distrust—distrust expressed in such doctrines as checks and balances, separation of power, and federalism).

79. Putnam, *supra* note 63, at 138.

80. *Id.* at 165; *see also* Xavier de Souza Briggs, *On Half-Blind Men and Elephants: Understanding Greater Ethnic Diversity and Responding to “Good-Enough” Evidence*, 19 *HOUSING POL’Y DEBATE* 218 (2008).

81. David Brooks, Op-Ed., *The End of Integration*, *N.Y. TIMES*, July 6, 2007, at A15.

82. Kushner, *supra* note 23, at 599.

83. Matt Bai, *What’s the Real Racial Divide?*, *N.Y. TIMES MAG.*, Mar. 16, 2008, at 15-16.

84. Brooks, *supra* note 81.

As Betsy Julian says, however, none of this can justify abandoning our efforts to achieve an inclusive community. She poses the central question: "Can we continue to honor the principles of our Constitution and laws, and acknowledge the mistakes of our past, if we embrace segregation as a goal for our future?"<sup>85</sup>

The answer to her question is and must be: No. Racial and economic integration must continue to be our goal, and we must do much better at reaching that goal. This certainly requires better enforcement of the Fair Housing Act and a return to the generous, remedial interpretations of the Act by the courts. It would be aided by structural improvements in the Act itself. But the most fundamental changes need to be made in our own understandings of the moral and practical evils that segregation causes. How can this be achieved? Turner prescribes education to overcome fears and stereotypes.<sup>86</sup> Schwemm, in an earlier article, discussed the importance of changing our national attitudes<sup>87</sup> and, in the article for this Symposium, shows that integration itself can be a cure for discrimination and segregation, for when people do live together they learn to move beyond stereotypes.<sup>88</sup> Strong leadership unquestionably is another and very important way of promoting and achieving integration.<sup>89</sup> Each of us, in many ways, individually and institutionally, with research and advocacy and art, with courage and perseverance, with imagination and creativity and determination, must devise new and ever more effective ways to achieve the goal of truly open and integrated communities. We must heed the call of Langston Hughes:

America!  
Land created in common,  
Dream nourished in common,  
Keep your hand on the plow! Hold on!  
If the house is not yet finished,  
Don't be discouraged, builder!  
If the fight is not yet won,

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85. Julian, *supra* note 8, at 562; *see also* Kushner, *supra* note 23, at 601 (stating that he "believe[s] it is essential to overcome fear, distrust, and the walled metropolis as an essential component of community").

86. Turner, *supra* note 3, at 815-16.

87. Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-07 (2007); *but see* Bai, *supra* note 83, at 16 (stating that "those living in the shadow of postindustrial atrophy seem to have a harder time detaching from enduring stereotypes").

88. *See generally* Schwemm, *Discriminatory Municipal Services*, *supra* note 8.

89. *See, e.g.*, MICHAEL N. DANIELSON & JAMES W. DOIG, *NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT* 166 (1982); MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 115, 125-26, 130, 252, 309-10 (1976); ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 133 (1973); Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 151-56, 158 (1998); Roisman, *supra* note 54, at 99-100.

Don't be weary, soldier!  
The plan and the pattern is here,  
Woven from the beginning  
Into the warp and woof of America:

**ALL MEN ARE CREATED EQUAL.**

NO MAN IS GOOD ENOUGH  
TO GOVERN ANOTHER MAN WITHOUT  
THAT OTHER'S CONSENT.

BETTER DIE FREE,  
THAN LIVE SLAVES.

Who said those things? Americans!  
Who owns those words? America!

Who is America? You, me!  
We are America!  
To the enemy who would conquer us from without,  
We say, NO!  
To the enemy who would divide  
and conquer us from within,  
We say, NO!

**FREEDOM!**  
**BROTHERHOOD!**  
**DEMOCRACY!**

To all the enemies of these great words:  
We say, NO!<sup>90</sup>

To paraphrase W.H. Auden, we must all live together, or die—spiritually, if not literally.<sup>91</sup>

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90. Langston Hughes, *Freedom's Plow*, in *SELECTED POEMS OF LANGSTON HUGHES* 291, 296-97 (1974).

91. Auden, *supra* note 1.



## MORE THAN A DREAMER: REMEMBERING DR. MARTIN LUTHER KING, JR.

MONROE H. LITTLE, JR.\*

During his lifetime Dr. Martin Luther King, Jr. justifiably received numerous citations and recognition for his work on behalf of oppressed people. Standing in the vortex of the civil rights struggle, he became, during the 1950s, one of the nation's foremost black leaders. With an oratorical style that drew directly on the force of the Bible and a serene confidence derived from his non-violent philosophy, Dr. King advocated a program of moderation and inclusion. Although later generations would question some of his message, few could deny that he was the guiding light for fifteen of the most crucial years in America's civil rights struggle. President Jimmy Carter acknowledged King's contributions by posthumously awarding him the Presidential Medal of Freedom in 1977.<sup>1</sup>

King's name is forever associated with places and events emblazoned in the nation's history—Montgomery, Birmingham, the Selma-to-Montgomery March, the March on Washington, and passage of the landmark 1964 Civil Rights and 1965 Voting Rights Acts. A recent search for books about or by Martin Luther King on amazon.com, which is by no means exhaustive, identified a staggering total of 42,078 sources for readers of all ages—far surpassing the number of books written about every other black American leader of the nineteenth and twentieth centuries. The number of books devoted to his life even surpasses that of a founding father of the republic, John Adams. Only three national icons—George Washington, Thomas Jefferson, and Abraham Lincoln—have more books published about them than King; and, ironically, King's total is almost equal to the number of volumes devoted to Jefferson.<sup>2</sup>

As King the man recedes in history, however, we often tend to forget that there were many Martin Luther Kings. He has been variously described as a husband, father, pastor, scholar, warrior, diplomat, anti-war activist, social critic, drum major for justice, reformer, dreamer, and even a revolutionary.<sup>3</sup> It is often

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Numerous facts reported throughout this Tribute do not contain citations because of their historical nature, but can be found in sources cited *infra* note 3.

1. Presidential Medal of Freedom Recipient Rev. Martin Luther King Jr., <http://www.medaloffreedom.com/MartLutherKingJr.htm> (last visited May 15, 2008).

2. The amazon.com totals, as of March 31, 2008, were: King, 42,078; Adams, 36,561; Washington, 74,088; Jefferson, 45,427; and Lincoln, 55,017. Among black leaders the totals were: Frederick Douglass, 11,150; Booker T. Washington, 7,515; W. E. B. DuBois, 4,970; Ida B. Wells, 2,087; Marcus Garvey, 4,755; Mary McLeod Bethune, 1,877; and Malcom X, 11,938.

3. The literature on Martin Luther King, Jr. is voluminous. See, e.g., LERONE BENNETT, JR., *WHAT MANNER OF MAN: A BIOGRAPHY OF MARTIN LUTHER KING, JR.* (1964); TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68* (2006); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1989); TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1998); DAVID J. GARROW, *BEARING THE CROSS: MARTIN*

easy to overlook this fact—the multi-faceted nature of King's life and work—because of the way in which our nation remembers him each January during the national holiday in his honor. Indeed, King occupies a strange position in the nation's collective memory. Although he was assassinated in April 1968, as far as most Americans are concerned, his life might just as well have ended in 1963 when he delivered his famous "I Have a Dream" speech on the steps of the Lincoln Memorial during the momentous March on Washington. King's life, as Mary Frances Berry reminds us, "suffers the fate of every human being—when you are dead you belong to the ages. People can distort your positions and use them for their own purposes."<sup>4</sup> Over time, King has been reduced to a mere dreamer who advocated an allegedly color-blind society. Our national memory of the man has been reduced to a one-dimensional caricature of the real King which makes the human cost of his struggle and more earthly, urgent appeals for justice magically disappear. "It appears that the price for the first national holiday honoring a black man," as Vincent Harding so presciently observed, "is the development of a massive case of national amnesia concerning who that black man was."<sup>5</sup> Yet it is the very "things we have chosen to forget about" Martin Luther King which "constitute some of the most hopeful possibilities and resources for our . . . nation."<sup>6</sup> That is why symposia such as this today are needed to rescue the real Dr. Martin Luther King, Jr.'s memory from popular myth and historical oblivion.

He was born Michael Luther King, Jr., in January 1929, in Atlanta, Georgia, but his father changed both of their names to Martin to honor the German leader of the Protestant Reformation. The young King attended segregated public schools in Atlanta, Georgia, and graduated from high school at the tender age of fifteen. He then attended Morehouse College where he received a B.A. degree. In 1951, he earned a B.D. from Crozer Theological Seminary. Four years later, he received a Ph.D. in Systematic Theology from Boston University.

In the forty years since his tragic death it is easy to forget, even for those of us who were alive then, what the state of race relations was both nationally and internationally during the years that King grew to adulthood. The United States was a country awash in racial prejudice and discrimination. Roadside signs urged hungry motorists to "Eat Nigger Chicken" and store shelves were stocked with cans of "Nigger Head Shrimp." Legal segregation was the rule in the South,

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LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986) [hereinafter GARROW, BEARING THE CROSS]; DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR.: FROM "SOLO" TO MEMPHIS (1981); DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978); CORETTA SCOTT KING, MY LIFE WITH MARTIN LUTHER KING, JR. (1969); JOHN A. WILLIAMS, THE KING GOD DIDN'T SAVE: REFLECTIONS ON THE LIFE AND DEATH OF MARTIN LUTHER KING, JR. (1970).

4. Mary Frances Berry, *Vindicting Martin Luther King, Jr.: The Road to a Color-Blind Society*, 81 J. NEGRO HIST. 137, 143 (1996).

5. Vincent Gordon Harding, *Beyond Amnesia: Martin Luther King, Jr., and the Future of America*, 74 J. AM. HIST. 468, 469 (1987).

6. *Id.*

while de facto segregation was the norm in Northern states, such as Indiana. Racial epithets and stereotypes such as darky, nigger lover, and coon were routinely used by mainstream media to describe African Americans and their white allies in the struggle for equality, while black criminal suspects were publicly described as fiends. Race riots in New York City; Detroit; Beaumont, Texas; and Columbia, Tennessee, during and immediately after World War II, claimed scores of lives and resulted in millions of dollars in property damage. The horrific crime of lynching, while on the decline, still claimed six lives in 1946. In fact, no year in the United States had been free of it since 1882. A 1969 *Foreign Affairs* article—worth reading even today—reminds us that as late as the 1940s the world “was still by and large a Western white-dominated world. The long-established patterns of white power and nonwhite non-power were still the generally accepted order of things. All the accompanying assumptions and mythologies about race and color were still mostly taken for granted.”<sup>7</sup> “[W]hite supremacy was a generally assumed and accepted state of affairs in the United States as well as in Europe’s empires.”<sup>8</sup>

In 1947—a year before King graduated from Morehouse College—President Harry S Truman’s Committee on Civil Rights issued its final report. That document entitled *To Secure These Rights*, presented a long list of the nation’s failures to live up to its democratic promise and protect the rights of its citizens.<sup>9</sup> The crime of lynching headed the Committee’s list, but the list also called attention to other problems related to racial prejudice and discrimination including police brutality, the administration of justice, involuntary servitude, the wartime evacuation of Japanese-Americans, voting, military service, employment, education, housing, and health care, as well as public services and accommodations.<sup>10</sup> “The National Government of the United States,” the Committee noted, “must take the lead in safeguarding the civil rights of all Americans.”<sup>11</sup> In an especially dire warning to its readers the report stated: “[t]he United States can no longer countenance these burdens on its common conscience, these inroads on its moral fiber”;<sup>12</sup> “[t]he United States can no longer afford this heavy drain upon its human wealth, its national competence”;<sup>13</sup> and “[t]he United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our [civil rights] record.”<sup>14</sup>

Surely King must have been aware of the Committee’s report. The African-American press not only praised the report and its thirty-four recommendations,

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7. Harold R. Isaacs, *Color in World Affairs*, 47 FOREIGN AFF. 235, 235 (1969).

8. *Id.* at 246.

9. See generally *TO SECURE THESE RIGHTS: THE REPORT OF PRESIDENT HARRY S TRUMAN’S COMMITTEE ON CIVIL RIGHTS* (Steven F. Lawson ed., 2004).

10. *Id.* at 62-111.

11. *Id.* at 126.

12. *Id.* at 160.

13. *Id.* at 164.

14. *Id.* at 167.

but also "serialized [it] and were joined in this enterprise by [mainstream] liberal periodicals. The American Jewish Congress distributed some two hundred thousand summaries of the report. Workshops were organized to discuss the committee's" findings and recommendations.<sup>15</sup> The Government Printing Office printed twenty-five thousand copies of the report, while "Simon & Schuster sold another thirty-six thousand copies."<sup>16</sup> In the end, it is estimated that over a million copies of *To Secure These Rights* were distributed.<sup>17</sup>

What we know most about Martin Luther King is situated in the public realm of his life as a Baptist minister and civil rights leader. He became pastor of the Dexter Avenue Baptist Church in Montgomery, Alabama, in 1953 at the age of twenty-four. Casual biographies of him suggest that he was committed to black civil rights from an early age, although there is little hard evidence of this. There is strong evidence in some sources that King would have preferred a quiet career in academia, rather than as a minister or civil rights leader. Andrew Young believes that King accepted the pastorate of the Dexter Avenue Baptist Church over his father's objections because "he wanted a nice quiet town where he could finish his doctoral dissertation and not . . . have the responsibility of a big church."<sup>18</sup>

Nor did King leap at the opportunity to lead the Montgomery bus boycott. According to E.D. Nixon, who was president of the local NAACP chapter at the time, King at first seemed hesitant to get involved in the proposed bus boycott.<sup>19</sup> When Nixon first contacted him by telephone about joining the boycott he is reported to have said, "'Brother Nixon, let me think about it awhile, and call me back.'"<sup>20</sup> He was elected president of the oddly named Montgomery Improvement Association ("MIA") despite his initial hesitancy because Nixon threatened to "'take the microphone'" at the first meeting of the MIA and denounce all of the local pastors as cowards and sycophants to the white power structure of the city.<sup>21</sup> Nixon later explained that there were two reasons that King was elected president of the MIA: (1) his outstanding speaking ability; and (2) that he had not been in Montgomery "long enough for the city fathers to put their hand on him."<sup>22</sup> An equally plausible explanation is that none of Montgomery's other black ministers wanted to accept a position which carried such heavy responsibility, was fraught with personal danger, and offered little promise of success.

Nor is there much evidence that King initially believed deeply in or

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15. *Id.* at 31.

16. *Id.*

17. *Id.*

18. Interview with Andrew Young, Executive Director, Southern Christian Leadership Conference, in HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 425, 425 (1983) [hereinafter *MY SOUL IS RESTED*].

19. Interview with E.D. Nixon, in *MY SOUL IS RESTED*, *supra* note 18, at 43, 45.

20. *Id.*

21. *Id.* at 48-49.

22. *Id.* at 48.

embraced the idea of non-violence with which his name is now forever linked. "On my second visit" to Montgomery during the bus boycott, King's "house was still being protected by armed guards," Bayard Rustin remembered.<sup>23</sup> In fact, Rustin recalled that when a companion of his began to take a seat in a chair in King's living room during that visit, Rustin had to warn him not to sit on the gun that occupied it.<sup>24</sup> At this stage of his life, as an emerging civil rights leader and spokesman, it appears that King was clearly feeling his way, but gradually, over the course of the bus boycott, King "deepened his commitment to nonviolence."<sup>25</sup>

It is in life's turbulence, as the lawyer and philosopher Johann von Wolfgang Goethe reminds us, however, that one's character is forged; and King was buffeted by enough turbulence in his life as leader of the MIA to last a lifetime. During the Montgomery bus boycott he was harassed and arrested by the Montgomery police, he and his family were threatened, and his home was bombed. It was at this point in his life, when he was feeling most burdened with the responsibilities of leadership and the safety of himself and his family, that he began to enunciate the philosophy of non-violence to his followers as a moral force to face down the vile immorality of white supremacist terrorism. According to King, the moment of truth came the evening when his house was bombed. Rushing home he found the remains of twelve sticks of dynamite still smoldering on his front porch along with an angry mob of supporters outside his residence. They were intent on revenge. Addressing the enraged crowd King said, "We cannot solve this problem with retaliatory violence. We must meet violence with nonviolence. Remember the words of Jesus: 'He who lives by the sword will perish by the sword.'"<sup>26</sup> Not quite the words one would expect from someone whose family has just narrowly escaped death at the hands of murderers. Urging the crowd to leave peacefully, King stated:

We must love our white brothers . . . no matter what they do to us. We must make them know that we love them. Jesus still cries out in words that echo across the centuries: Love your enemies; bless them that curse you; pray for them that despitefully use you. This is what we must live by. We must meet hate with love.<sup>27</sup>

In that one shining moment King defined the course of black civil rights protest for the next fifteen years.

Fresh from the Montgomery victory, which made him a national figure, in 1957 King was elected president of the newly formed Southern Christian Leadership Conference ("SCLC"), a group designed to harness the moral authority and organizing power of black churches to conduct non-violent protests in the interest of civil rights reform. His approach, forged in the crucible of the

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23. Interview with Bayard Rustin, *in* *MY SOUL IS RESTED*, *supra* note 18, at 52-53.

24. *Id.*

25. *Id.*

26. MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM; THE MONTGOMERY STORY* 137 (1958).

27. *Id.* at 137-38.

Montgomery bus boycott, was based on the ideas of Henry David Thoreau and Mohandas Gandhi, as well as on Christian teachings. A trip to India in 1959 to meet the Gandhi family cemented his belief in and commitment to non-violent resistance as an effective tactic to advance the cause of black freedom and civil rights in the United States.

If Montgomery thrust King into the national spotlight, it was Birmingham, Alabama, which cemented his reputation as a civil rights leader. Following a disastrous attempt to desegregate the city of Albany, Georgia, King and the SCLC turned their sights on Birmingham. It was a city which, King remembered, “had apparently never heard of Abraham Lincoln, Thomas Jefferson, the Bill of Rights, the Preamble to the Constitution, the Thirteenth, Fourteenth and Fifteenth Amendments, or the 1954 decision of the United States Supreme Court outlawing segregation in the public schools.”<sup>28</sup> Everything in Birmingham, as it was ominously nicknamed, was segregated and city officials—symbolized by its no-nonsense Commissioner of Public Safety Theophilus Eugene “Bull” Connor—maintained this rigid system of American apartheid with an iron fist. “Now what we’re going to have to do” is “center all our forces here in Birmingham . . . because Birmingham is the testing ground,” King informed the movement’s leadership upon his arrival in the city.<sup>29</sup> “If we fail here, then we will fail everywhere, because every segregated city and every segregated state is watching which way Birmingham goes.”<sup>30</sup>

And watch they did. In fact, the entire nation and the world watched in incredulity and horror as Connor subjected phalanxes of nonviolent protesters to a torrent of physical abuse that included police night sticks and snarling dogs, as well as fire hoses with water pressure so powerful that it stripped the bark off trees and bowled marchers over like ten pins. Nothing stopped them—not even a court injunction forbidding King and his staff from leading further marches.<sup>31</sup> They filled the city’s jails to the point of overflowing. At one point it is estimated that 4,500 protestors were in jail, with another ten or twenty thousand in the streets who “wanted to get in.”<sup>32</sup>

It was the forty-five day siege of Birmingham—there is no other suitable word to describe it—that forced King to commit “once and for all to the philosophy that one had a positive moral duty to violate unjust laws.”<sup>33</sup> Despite some early success in unifying Birmingham’s black community, the movement had exhausted all of its available funds for cash bonds and “the bondsman who had . . . furnished bail for the demonstrators” informed King and his staff “that he would be unable to continue.”<sup>34</sup> King later wrote, “I thought about the people in jail. I thought about the Birmingham Negroes already lining the streets of the

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28. MARTIN LUTHER KING, JR., WHY WE CAN’T WAIT 47 (1964).

29. Interview with Ed Gardner, in MY SOUL IS RESTED, *supra* 18, at 139, 143.

30. *Id.* at 143.

31. *Id.* at 143-44.

32. *Id.* at 145.

33. *Id.* at 143.

34. KING, WHY WE CAN’T WAIT, *supra* note 28, at 71.

city, waiting to see me put into practice what I had so passionately preached.”<sup>35</sup> Deep in thought, King retired to another room in the suite which his staff occupied at the Gaston Motel, “pulled off [his] shirt and pants, got into work clothes and went back to the other room to tell [staff members that he] had decided to go to jail.”<sup>36</sup> Arrested on Good Friday, King was kept incommunicado in solitary confinement for more than twenty-four hours.<sup>37</sup> His “Letter from Birmingham Jail,” written during his eight days of imprisonment in solitary confinement at the height of the non-violent protest in that city, became a manifesto for the civil rights movement and continues to inspire readers even today.<sup>38</sup>

King gave much of his energies to organizing protest demonstrations and marches in other cities across the South beside Birmingham. The marches were for the right to vote, desegregation, labor rights, and other basic civil rights. The protests won national and international media coverage and public sympathy for the indignities suffered by Southern blacks, providing what he called “a coalition of conscience” and bringing the civil rights movement to the forefront of American politics in the 1960s.

King’s finest hour as a spokesperson for the movement came on August 28, 1963, when he led the great march in Washington, D.C., that culminated with his famous “I Have a Dream” speech at the Lincoln Memorial.<sup>39</sup> The March on Washington for Jobs and Freedom was the cooperative effort of the big six civil rights organizations—SCLC, NAACP, Urban League, SNCC, Brotherhood of Sleeping Car Porters, and the Congress of Racial Equality. It was the first and last time that this assemblage of competing civil rights organizations displayed such a unity of purpose. An unequivocal success, more than a quarter million people<sup>40</sup> of all races attended the event, making it the largest gathering of protesters in Washington’s history.

Political success for King and the movement came with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. At the height of his influence, Martin Luther King was awarded the Nobel Peace Prize in 1964 at age 35, becoming the award’s youngest recipient.<sup>41</sup> With characteristic disregard for his own well-being, he turned over the prize money, \$54,000, to the movement.<sup>42</sup>

Dr. Martin Luther King, Jr. unquestionably deserves the accolades and recognition for his accomplishments as a charismatic leader of social protest and civil rights reform. However, such acclaim masks other equally deserving aspects of his career, namely, those of an astute social critic and public policy analyst. It is often overlooked, even by some biographers of the man, that King

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35. *Id.* at 72.

36. *Id.* at 73.

37. *Id.* at 74.

38. See generally *id.* at 76-95.

39. See generally *id.* at 122-25.

40. *Id.* at 123.

41. GARROW, BEARING THE CROSS, *supra* note 3, at 354, 369.

42. *Id.* at 357, 368.

wrote extensively during his lifetime. Between 1957 and 1968 King wrote five books as well as numerous articles. If one takes factual accuracy as an acceptable benchmark for scholarly accomplishment, then King was not simply a charismatic leader of the civil rights multitudes, but a perceptive observer of American society too. At a time when many social scientists were issuing proclamations of inevitable black American progress, King took exception to their optimism. In what is perhaps his most significant monograph, *Where Do We Go From Here: Chaos or Community?*, King took exception to the virtually unanimous proclamations of black advancement in the 1960s. King wrote, "The economic plight of the masses of Negroes has worsened. The gap between the wages of the Negro worker and . . . the white worker has widened. Slums are worse and Negroes attend more thoroughly segregated schools today than in 1954."<sup>43</sup> Government statistics for this period would appear to confirm King's opinion. In the area of housing, for example, data from the Bureau of Labor statistics for that period indicate that housing conditions worsened considerably for blacks. Overcrowding between 1950-1960 for black tenant-occupied dwellings increased from 442,000 to 477,000, while the figure for whites dropped from 970,000 to 632,000, and increased for blacks in owner-occupied non-farm housing units from 106,000 to 156,000, while the figure for whites dropped from 480,000 to 439,000.<sup>44</sup> In 1959 the U.S. Commission on Civil Rights reported that "[i]f the population density in some of Harlem's worst blocks obtained in the rest of New York City, the entire population of the United States could fit into three of New York's boroughs!"<sup>45</sup>

In 1966, King's concern about the plight of black Americans in the nation's urban ghettos prompted him to use his newfound powers and prestige to attack discrimination in the North. That spring, several dual white couple/black couple tests of the local real estate market uncovered the now banned practice of steering—the racially selective processing of housing requests by couples of otherwise equal income, background, and number of children. To educate themselves about the plight of Northern blacks and demonstrate their support and empathy for the poor, King and Reverend Ralph David Abernathy moved to Chicago's slums and assisted local civil rights leaders in founding the Chicago Freedom Movement. Their reception in Chicago was none too cordial. In fact, the violence was so formidable that it shook King and his friend, Abernathy. Their marches to bring attention to housing and job discrimination in the North were met by thrown bottles, hecklers, and screaming throngs of irate whites. While leading a march in an all-white Chicago neighborhood, King was even struck in the head by a rock. Later, both King and Abernathy noted that the public reception they received in Chicago was much worse than in the South, the

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43. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 40-41 (Bantam Books 1968) (1967) [hereinafter KING, *WHERE DO WE GO FROM HERE*].

44. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *THE NEGROES IN THE UNITED STATES: THEIR ECONOMIC AND SOCIAL SITUATION* 211 (1966).

45. Sidney M. Willhelm, *Martin Luther King, Jr. and the Black Experience in America*, 10 J. BLACK STUD. 3, 5 (1979).

politics more corrupt, and the threat of violence more dire. King and Abernathy eventually returned to the South, leaving a young Jesse Jackson to continue their work.

The Chicago Freedom Movement was not the first time that King called attention to housing discrimination in the United States. Decent and affordable housing was a concern of Martin Luther King's throughout his career as a civil rights leader. In his first annual report on civil rights published in *The Nation* magazine in 1961, King wrote, "Unfortunately, the federal government has participated directly and indirectly in the perpetuation of housing discrimination."<sup>46</sup> Although most federal housing programs

have anti-discrimination clauses, they have done little to end segregated housing. It is a known fact that FHA continues to finance private developers who openly proclaim that none of their homes will be sold to Negroes. The urban renewal program has, in many instances, served to accentuate, even to initiate, segregated neighborhoods.<sup>47</sup>

Drawing a powerful lesson from the nation's recent history, King recognized that the federal government could play a decisive role in bringing an end to this deplorable situation. He noted that in the years since the Great Depression, the federal government underwrote much of the housing built in this country, making home ownership the emblem of American middle-class status.<sup>48</sup> "Since its creation in 1934, the FHA alone insured more than thirty-three billion dollars in [home] mortgages. . . . [Public Housing Administration] programs [built] more than two-thousand low-rent housing projects in forty-four states and the [nation's capital]. The [Urban Renewal Administration], . . . established in 1954, . . . approved projects in more than 877 [cities]."<sup>49</sup> The G.I. Bill of Rights provided government loans to World War II veterans to such an extent that in some years it is estimated that "thirty percent of all new urban [houses] were built with the help of VA loan guarantees."<sup>50</sup>

Two years later, King revisited the issue of housing discrimination. Writing shortly after the bombing of the Sixteenth Street Baptist Church, which resulted in the deaths of four little girls<sup>51</sup> in Birmingham, Alabama, King criticized the glacial pace with which proposed civil rights legislation was moving through the Eighty-Eighth Congress. What was to be done to accelerate the process? King

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46. Martin Luther King, Jr., *Equality Now: The President Has the Power*, NATION, Feb. 1961, at 91, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 152-159, at 156 (James Melvin Washington ed., 1986) [hereinafter A TESTAMENT OF HOPE].

47. *Id.* at 156-57.

48. *Id.* at 157.

49. *Id.*

50. *Id.*

51. The four little girls were eleven-year-old Denise McNair and fourteen-year-olds Cynthia Wesley, Carole Robertson, and Addie Mae Collins. A fifth, Sarah Collins, the sister of Addie Mae Collins, was critically injured.

noted that quick, decisive federal action was possible by the Executive Branch against housing discrimination “even in the absence of legislation.”<sup>52</sup> King also noted that President Kennedy, “after considerable delay, issued an order prohibiting segregation in government financed housing[, but it] was conspicuously flawed with compromise and to this date has not significantly altered any housing patterns.” Nevertheless, it was another example of the application of presidential power, and if timidity of conception or execution limited the effect, still a new path was chopped through the thicket. Alert and aggressive civil rights forces have an opportunity to pave a highway over it.<sup>53</sup>

In 1965, Watts exploded in violence, just days after passage of the Voting Rights Act. To Americans who lived with the illusion that racial prejudice and discrimination were uniquely Southern phenomena, the Watts riot left many of them wondering how this could happen. King had a ready answer. “The flames of Watts illuminated more than the western sky; they cast light on the imperfections in the civil rights movement and the tragic shallowness of the white racial policy in the explosive ghettos.”<sup>54</sup> King noted that despite the successes enjoyed by civil rights activists in challenging and dismantling Jim Crow, “[i]n the North, on the other hand, the Negro’s repellent slum life was altered not for the better but for the worse. . . . To the homes of ten years ago, squalid then, were added ten years of decay.”<sup>55</sup> When a journalist asked him how he proposed to allay homeowners’ fears of “property devaluation” with the arrival of blacks in “hitherto all-white neighborhoods,” King replied, “We must expunge from our society the myths and half-truths that engender” fear among white homeowners that a just housing policy would lead to property devaluation and white flight.<sup>56</sup>

The fact is that most Negroes are kept out of residential neighborhoods so long that when one of us is finally sold a home, it’s *already* depreciated. In the second place, we must dispel the negative and harmful atmosphere that has been created by avaricious and unprincipled realtors who engage in “blockbusting.” If we had in America really serious efforts to break down discrimination in housing, and at the same time a concerted program of government aid to improve housing for Negroes, I think that many white people would be surprised at how many Negroes would choose to live among themselves, exactly as Poles and Jews and other ethnic groups do.<sup>57</sup>

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52. Martin Luther King, Jr., *Hammer on Civil Rights*, NATION, Mar. 1964, at 230, reprinted in A TESTAMENT OF HOPE, *supra* note 46, at 169, 171.

53. *Id.* at 171-72.

54. Martin Luther King, Jr., *Next Stop: The North*, SATURDAY REV., Nov. 13, 1965, at 33, reprinted in A TESTAMENT OF HOPE, *supra* note 46, at 189, 189.

55. *Id.*

56. *Playboy Interview: Martin Luther King, Jr.*, PLAYBOY, Jan. 1965, at 117, reprinted in A TESTAMENT OF HOPE, *supra* note 46, at 340, 368.

57. *Id.* at 368-69.

Meanwhile, as the Vietnam War began to consume the country, King broadened his criticisms of American society to include U.S. foreign as well as domestic policy. In an April 1967 speech in New York City, King called the U.S. government "the greatest purveyor of violence in the world today."<sup>58</sup> His outspoken criticism of American foreign policy caused the mainstream American media and even some of his staunchest supporters to question King's wisdom in doing so. Following his New York City speech against the war, Indiana University Law School alumnus Henry J. Richardson wrote King the following letter:

I regret very much that you have become nationally embroiled as an image symbol of social leadership in the frustrating [sic] and confusing national policy of Vietnam. I can understand . . . that as a Nobel Prize Winner you have a moral responsibility to our nation and to our world, but in the meantime you have a greater moral responsibility to your people in America who are looking to you for a blueprint for the future and guidelines for direction. Your image symbol cannot and must not be demoralized or tarnished, even when you are right on some issue as it will cause you to lose your effectiveness and prestige as a social minority leader.

. . . Your moral position on Vietnam is correct but I wholly disagree with your projection at this time as it will definitely weaken our social progress, which is already facing the backlash of reaction. I do not mean to say that the policy of Vietnam should be condoned nor sanctioned, for war is wrong per se but we must crawl before we can walk and we must remember that Rome was not built in a day.<sup>59</sup>

King was also an advocate of a government compensatory program seeking to improve the lives of poor Americans. In 1968, without the full support of the SCLC, King organized the Poor People's Campaign, which included another march on Washington, D.C. The organization demanded aid for the poorest communities in the United States and sought an economic bill of rights that provided for massive government job programs to reconstruct society. Critics called this switch in King's agenda a new brand of democratic socialism.

In the spring of 1968, King traveled to Memphis, Tennessee, to show support for black city sanitation workers striking for higher wages and better treatment. He was shot and killed as he stood on the balcony of the Loraine Motel. King was just thirty-nine years old. The assassination led to a wave of riots in cities nationwide, and President Johnson declared a national day of mourning in Dr. King's honor.

In the wake of King's assassination, Congress passed the Federal Fair

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58. Martin Luther King, Jr., *A Time to Break the Silence*, in *A TESTAMENT OF HOPE*, *supra* note 46, at 233.

59. Letter from Henry J. Richardson to Martin Luther King, Jr. (April 12, 1967) (on file with Indiana Historical Society, Henry J. Richardson Papers, M472, Box 7, Folder 5).

Housing Act on April 10, 1968, and President Johnson signed it on April 11, 1968. This, in my estimation, is a most appropriate tribute to King. However, it is important to note that its enactment came only after a long and difficult journey. From 1966-1967, Congress regularly considered the fair housing bill, but failed to garner a strong enough majority for its passage. However, when King was assassinated April 4, 1968, President Lyndon Johnson utilized this national tragedy to press for the bill's speedy congressional approval. Since the 1966 open housing marches in Chicago, Dr. King's name had been closely associated with fair housing legislation. President Johnson viewed the Act as a fitting memorial to the man's life's work and wished to have the Act passed prior to Dr. King's funeral in Atlanta.

The questions King asked himself about the future of the United States as well as its domestic and foreign policies during the course of his life and work as a human rights leader were in many ways the same ones we ask today. How do we provide real equal opportunity for black Americans to overcome the burden of race? How do we assist those disadvantaged by poverty? How should we conduct ourselves in international affairs? How do we achieve a just society? Even while basking in his success, King realized that the civil rights movement's early victories were only against symptoms rather than the root cause of the so-called American dilemma. He came to understand that the civil rights struggle was, in actuality, a battle for the very heart and soul of a nation in which the ideal polity of the classical social contract was under-written by an all too real polity constructed according to what the philosopher Charles Mills calls the "racial contract."<sup>60</sup> This racial contract was "political, moral, and epistemological," as well as "a historical actuality"; it defined and created racialized spaces of white suburbs and black ghettos and the persons and subpersons who inhabited them; it exploited its victims; and, finally, this racial contract was "enforced through violence and ideological conditioning."<sup>61</sup> In short, King comprehended the terrible truth that represented the core of the American dilemma; namely, that "[w]hite supremacy is the unnamed political system that has made the modern world what it is today."<sup>62</sup>

Nationally, King realized that within America's Herrenvolk democracy this racial contract manifested itself in white resistance to anything more than the formal extension of the terms of the abstract social contract. Whereas previously it was denied that non-whites were equal persons, as manifested in chattel slavery and Jim Crow, society now pretended that non-whites are equal abstract persons who can be fully included in the polity merely by extending the scope of the moral operator, without any fundamental change in the arrangements that resulted from the previous system of explicit *de jure* racial privilege. King realized that the civil rights movement's success against *de jure* racial segregation in the South had uncovered other less transparent, yet no less oppressive, forms of *de facto* white privilege in employment and housing as well

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60. *See generally* CHARLES W. MILLS, THE RACIAL CONTRACT (1997).

61. *See id.* at 9-62, 81-89.

62. *Id.* at 1.

as access to health care, education, business capital, etc.

It is only fairly recently that scholars have equaled King's hard-earned racial wisdom on this score. The black law professor Patricia Williams, for example, complains about an ostensible neutrality that is really "racism in drag,"<sup>63</sup> a system of "racism as status quo" which "is deep, angry, eradicated from view," but continues to make people "avoid [] the phantom as they did the substance," deferring to the unseen shape of things.<sup>64</sup> Similarly, the black philosopher of law Anita Allen remarks on the irony of standard philosophy of law texts, which describe a universe in which "all humans are paradigm rightsholders" and see no need to point out that the actual U.S. record is somewhat different.<sup>65</sup> Thus, a recent book about how American apartheid is maintained in the post-civil rights era points out that whereas in the past realtors would have simply refused to sell to blacks, now blacks "are met by a realtor with a smiling face who, through a series of ruses, lies, and deceptions, makes it hard for them to learn about, inspect, rent, or purchase homes in white neighborhoods. . . . Because the discrimination is latent, however, it is usually unobservable, even to the person experiencing it."<sup>66</sup> Nonwhites then find that race is, paradoxically, both everywhere and nowhere, structuring their lives, but not formally recognized as a political/moral reality.

King believed that it was of the utmost necessity for blacks to acquire power to deal with major economic transformations in the United States which might occur since "the Negroes' problem cannot be solved unless the whole of American society takes a new turn toward greater economic justice."<sup>67</sup> This new direction, according to King, meant that the U.S. economy must become more person-centered than property and profit-oriented. King, in particular, detected the unique economic phenomenon about automated production; namely, the shift from a labor-oriented to a goods distribution and service-oriented economy. It was no longer realistic to speak of unemployment as much as a total disengagement from the work force.

During his all too brief career as a civil rights leader, social critic, and policy analyst, King also understood that a major barrier to dismantling the system of racial oppression in the United States was the inability of most whites to see their world as it actually is. As a general rule, King believed that white misunderstanding, misrepresentation, evasion, and self-deception on matters related to race were among the most pervasive obstacles to achieving genuine racial justice in the United States. The requirements of cognition, factual and moral, in the type of racial polity which existed in the United States precluded self-transparency and a genuine understanding of social realities. To a

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63. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 116 (1991).

64. *Id.* at 49.

65. Anita L. Allen, *Legal Rights for Poor Blacks*, in *THE UNDERCLASS QUESTION* 117, 117-39 (Bill E. Lawson ed., 1992).

66. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 97-98 (1993).

67. KING, *WHERE DO WE GO FROM HERE*, *supra* note 43, at 58.

significant extent, whites resided in an invented delusional world, a racial fantasyland, a consensual hallucination, though this particular hallucination was situated in real space. Is it any wonder, then, that so many of King's writings and press interviews devote so much of his time and energy to explaining the brutal reality of racial prejudice and discrimination or dispel the Mount Everest of myths and misconceptions harbored by whites about blacks and black social, political, and economic aspirations? It was a herculean task which even, at times, challenged the infinite patience of Martin Luther King.

In this respect, King proves to be superior to most scholars not only factually speaking, but also in respect to analytical ability. He vividly perceived the necessity to supplant the demand for equality with justice. King was one of the very first to realize that equality impedes black opportunity; to invoke standards for judgment regardless of color introduces direct competition at just the moment when blacks are least able to compete. Increased poverty, substandard education, deteriorated housing, and higher unemployment relative to whites are conditions that both reflect and determine the lack of resources among blacks to compete, regardless of color, in a white supremacist society. Centuries of white privilege and oppression of non-whites that have relegated blacks into inferiority cannot be overcome by imposing a concept of equality predicated upon a universalistic demand which forbids recognition of this salient truth. Being less socially qualified to compete means that black inferiority persists and white privileged access to material resources remains unencumbered. King forcefully attacked the liberal formulation of equality:

The white liberal must affirm that absolute justice for the Negro simply means . . . that the Negro must have "his due." . . . It is, however, important to understand that giving a man his due may often mean giving him special treatment. I am aware of the fact that this has been a troublesome concept for many liberals, since it conflicts with their traditional ideal of equal opportunity and equal treatment of people according to their individual merits. But this is a day which demands new thinking and the re-evaluation of old concepts. A society that has done something special *against* the Negro for hundreds of years must now do something special *for* him, in order to equip him to compete on a just and equal basis.<sup>68</sup>

King thereby saw a real choice for whites in advancing civil rights, though admittedly a difficult one. Where morality has been racialized, the practice of a genuinely color-blind ethic requires the repudiation of one's Herrenvolk standing and its accompanying moral epistemology in the name of a broader definition of humanity. By rejecting their white privilege and the normed inequities of the white polity, they would be able to stand together with non-whites in speaking out, struggling against and dismantling the politicoeconomic system of white supremacy.

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68. *Id.* at 105-06.

# THE FAIR HOUSING ACT AND EXTRALEGAL TERROR

JEANNINE BELL\*

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.<sup>1</sup>

Quinetta May was in search of a better life.<sup>2</sup> A Black single mother of three, she was determined to leave something to her children. In 2002 she purchased her first home in a white neighborhood in Mobile, Alabama. Just before she moved in, she purchased supplies to spruce up the house for occupancy.<sup>3</sup> Upon arrival, she discovered some neighbors might not have welcomed her coming to the neighborhood. The back door of the house had been kicked in.<sup>4</sup> The intruders had written in bright red letters “KKK” and “Nigga” across two living room walls and the kitchen window. May decided not to move into the house.<sup>5</sup>

Violence of the type experienced by May, considered by many to be a thing of the past, is unfortunately all too common. Even in the current era, minorities moving to, and in some cases living in, white neighborhoods around the country have faced harassment, vandalism, and assaults brought by neighbors who wish them to live elsewhere. I use the term “anti-integrationist violence” to describe two phenomena: 1) extralegal acts of terrorism, or crimes directed at minorities immediately upon moving to white neighborhoods; and 2) crimes targeted at African Americans and other racial and ethnic minorities while residing in majority white neighborhoods that are designed to drive them out. This definition accurately reflects the full range of experiences of those integrating racial and ethnic minorities whose presences are rejected by their white neighbors. If acts of anti-integrationist violence come to the attention of law enforcement, they may be investigated and prosecuted as hate crimes. Such incidents also violate state and federal fair housing legislation. This Article examines the implications the Fair Housing Act (“FHA”) has on anti-

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1. *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).
2. Rhoda A. Pickett, *To Stay or Go? Mobile-Area Families Grapple with Race-Driven Vandalism*, MOBILE REG., July 22, 2002, at 1A.
3. *Id.*
4. *Id.*
5. *Id.*

integrationist racial violence faced by families like Quinetta May's. Part I of this Article analyzes the problem of anti-integrationist violence in two periods, before and after the passage of the FHA. Part II describes several important mechanisms in how the FHA functions as a remedy for extralegal violence. The Article concludes in Part III with a call for a more targeted approach to the problem of anti-integrationist violence.

## I. THE SCOURGE OF ANTI-INTEGRATIONIST VIOLENCE

Violent resistance targeted at racial minorities moving into white neighborhoods originated with minorities' first moves to white neighborhoods and continues in the present day. Anti-integrationist violence directed at minorities in this context can be divided into two eras. The first era spans from the turn-of-the-century until the passage of the FHA, which outlawed discrimination on the basis of race, national origin, color, and religion in the sale, rental, and occupancy of housing.<sup>6</sup> The second era covers the last forty years, the period from 1968 until 2008.

### A. *Extralegal Anti-Integrationist Violence Before 1968*

Extralegal violence long has played a significant role in restricting the housing choices of racial and ethnic minorities in the United States. This may stem, at least in part, from longstanding popular narratives of the control white Americans were endowed with in their residential spaces. Dating back to the days of the frontier, the home has been constructed as a place of sanctuary which sheltered its occupants from the dangers outside of its walls. On the frontier, the shotgun kept home, hearth and possessions safe from intruders. As the nation industrialized and Americans made their homes in more urban settings, they lived in much closer proximity than they had on the frontier. With closer neighbors, city dwellers in urban neighborhoods solidified a series of new social networks. In these new spaces, white Americans' territory became not just one's own individual plot, but also the surrounding neighborhood, occupied by friends, family, and associates.

As the neighborhoods began to be seen as white residents' territory, resistance to minority integration in the period prior to the FHA was fought on two fronts—on the legal front, through creation of restrictive covenants forbidding the sale of property to persons of particular race and through racialized zoning legislation restricting minority housing choices.<sup>7</sup> On the

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6. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619). Though the Act states this, the issue of discrimination in occupancy is contested. *See* Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717 (2008).

7. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 70-71 (1917) (challenging an ordinance prohibiting Blacks from occupying particular blocks if the greater number of houses in the block were occupied by whites); Tyler v. Harmon, 104 So. 200, 200-01 (La. 1925), *aff'd*, 107 So. 704 (La. 1926), *rev'd*, 273 U.S. 668 (1927) (involving an ordinance that required written consent from

extralegal front, whites engaged in a campaign of pressure focused on the individual minorities moving in. On this latter front, white residents faced the integration of African Americans, which began in earnest in the 1920s, "as if defending against a foreign enemy, using any means at their disposal to deter the migration."<sup>8</sup> Many of the worst attacks took place in northern cities in the middle of the country—for example, in Detroit, Chicago, and Cleveland.<sup>9</sup> The early days of large-scale African-American migration to white neighborhoods in cities such as Chicago and New York consisted of Black professionals moving out of the cramped neighborhoods in which Black migrants from the south had been confined.<sup>10</sup> Black pioneers moving to white neighborhoods faced a backlash of violent white resistance. Scholars estimated the number of housing related crimes—such as bombings, arson, cross-burnings, and vandalism, "undoubtedly number[ed] in the thousands."<sup>11</sup>

One of the most famous cases of the violence directed at Black professionals who moved to white neighborhoods in the 1920s was a case of Ossian Sweet, a Black physician who moved to a bungalow in a white neighborhood in Detroit. Soon after Sweet and his wife Gladys moved in, stone-throwing white mobs containing hundreds of people surrounded the house.<sup>12</sup> Perhaps in part because it did not have the dramatic ending, Samuel Browne's experience moving to a white neighborhood in Staten Island, New York in 1924 is slightly more representative of the resistance directed at African Americans generally.<sup>13</sup> After Browne purchased a house in the neighborhood, whites threatened to burn down the house if he moved in. One of several threatening letters he received warned: "'If you moved into that house . . . it will be the worst days [sic] work that you ever did . . . You should know better than to move where you are not wanted.' It was signed, 'Yours in the flaming cross, K.K.K.'"<sup>14</sup>

As is typical in many historical and contemporary cases involving neighborhood-based violence, the Ku Klux Klan was not responsible for sending

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majority of majority race inhabitants before member of minority race could establish a home).

8. STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 6 (2000).

9. *Id.* at 31-39.

10. *Id.* at 13-16.

11. Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 345 (2002) (reviewing MEYER, *supra* note 8) (documenting individual acts of move-in violence between 1910 and 1959).

12. This particular case was unusual in that Sweet expected trouble, and was armed. Two white men were shot and Sweet was arrested. *See KEVIN BOYLE, ARC OF JUSTICE* 34-43 (2004).

13. MEYER, *supra* note 8, at 34.

14. Browne may have realized that first letter he received was not from the Klan when he received a second threatening letter telling him to get out. The second letter also informed Browne that the current letter "was his first and only warning." *Id.* "We have never written you before, nor have we done anything thus far to harm you[; a word to the wise is usually sufficient. . . . Are you wise? KKK." *Id.* (alteration in original).

the letter.<sup>15</sup> Notwithstanding the threats, Browne decided to move into the house and found his windows broken in the middle of the night. Browne was lucky to receive police protection, and the violence abated. Compared with other Blacks integrating white neighborhoods in the early twentieth century, Browne was quite fortunate. As Blacks moved out of Chicago's Black Belt between 1917 and 1921, there were fifty-eight housing-related fire bombings.<sup>16</sup>

One important characteristic of the anti-integrationist violence directed at minorities moving to white neighborhoods in the era prior to 1968 was that resistance was often collective. Whites formed groups, some formal and others informal, to resist minority move-ins. Informal groups included mobs, like the group of 100 housewives that "heckl[ed] and picket[ed]" the Clarks, a Black family who tried to occupy an apartment in Cicero, Illinois, in 1951.<sup>17</sup> Groups of more formally organized individuals included block associations like the South Deering Improvement Association and the White Circle League, groups specifically organized to oppose African-American integration of white neighborhoods.<sup>18</sup> These groups picketed and hurled bricks at the Howards, a Black family who moved to an apartment in South Deering, Illinois in 1953.<sup>19</sup>

White neighborhood defense was an all-encompassing job involving confrontations, protesting, picketing, in addition to violent attacks.<sup>20</sup> Participation spanned several generations, with young parents, teenagers, pre-adolescent boys, and elderly people all employed in the task of neighborhood defense. Women were especially involved. One situation occurred on the lower west side of Detroit when the white owner of two houses sold them to Black families in 1948.<sup>21</sup> Groups of ten to twenty-five women, accompanied by their children, appeared in front of the house for a week carrying hand-painted signs proclaiming: "my home is my castle, I will die defending it."<sup>22</sup>

Whites openly communicated that minorities should not make their homes in particular areas. Forsyth County, Georgia, and Coleman County, Alabama, were two southern counties where whites were utterly unambiguous about the fact that Blacks were not welcome.<sup>23</sup> Before the civil rights movement, citizens of both Forsyth County and Coleman County erected signs at the entrance to the county stating, "Nigger, don't let the sun set on your head in Coleman [Forsyth] county."<sup>24</sup>

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15. *Id.*

16. *Id.*

17. *Id.* at 118.

18. *Id.* at 120.

19. *Id.*

20. THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS 249 (1996).

21. *Id.* at 250.

22. *Id.*

23. KLAN WATCH PROJECT, S. POVERTY LAW CTR., "MOVE-IN" VIOLENCE: WHITE RESISTANCE TO NEIGHBORHOOD INTEGRATION IN THE 1980's, at 13 (1987).

24. *Id.* Though the signs were removed at the beginning of the civil rights movement, the report details that the prejudice remained. *Id.* In 1978, a Black activist traveling through Coleman

Forsyth County, Georgia, and Coleman County, Alabama, were not the only “sundown towns.” In his book, *Sundown Towns*, sociologist James W. Loewen documents the existence of thousands of towns, cities, suburbs, and neighborhoods throughout the United States that excluded most African Americans and other minorities after sundown.<sup>25</sup> From 1880 and continuing until 1968, white Americans established thousands of sundown towns, most often by driving out their Black community. Loewen identified 472 sundown towns in the State of Illinois alone.<sup>26</sup> Some jurisdictions passed ordinances preventing Blacks from owning or renting property; others simply used harassment and even murder to police violators. African Americans were not the only minorities barred from living in sundown towns and sundown suburbs. Jews, Mexicans, Chinese, and Native Americans were other groups that found their presence prohibited in such towns.<sup>27</sup>

### *B. Extralegal Violence Since the Passage of the Fair Housing Act*

The passage of the Fair Housing Act in 1968 was the culmination of a massive coordinated legal strategy stretching back to the early 1900s orchestrated by the NAACP to eradicate restrictions on housing for African Americans. A series of targeted cases by the civil rights organization led to a variety of court rulings prohibiting discrimination in housing. These include rulings which prohibited districts from restricting the number of Blacks living in a particular area;<sup>28</sup> rulings which struck down ordinances requiring written consent before minorities could move to an area;<sup>29</sup> and rulings which held unenforceable restrictive covenants mandating that property not be sold to individuals of particular races.<sup>30</sup> These legal changes in white residents’ ability to legally restrict minorities’ immigration were accompanied by “white flight”—a phenomenon in which whites abandoned neighborhoods after minorities moved in.<sup>31</sup> Eventually many of the whites resisting minority integration fled to the suburbs.<sup>32</sup> In some cases neighborhoods like Garfield Park in Chicago, where whites had fiercely resisted Blacks moving in, underwent significant racial shifts,

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County was kidnapped, beaten, and then released. *Id.* at 13 n.16.

25. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4 (2005). Though these existed all over the United States, according to Loewen such towns were rare in the South. *Id.* Loewen insists that even when African Americans in general were expelled, some servants were allowed to live in sundown towns. *Id.* at 37.

26. *Id.* at 61.

27. *Id.* at 75-76.

28. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

29. *Harmon v. Tyler*, 273 U.S. 668 (1927) (per curiam).

30. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

31. Howard Aldrich, *Ecological Succession in Racially Changing Neighborhoods: A Review of the Literature*, 10 URB. AFF. Q. 327, 331-44 (1975).

32. See, e.g., SUGRUE, *supra* note 20, at 266 (describing whites who fled to the suburbs in Detroit and defended them from Blacks who moved there).

as whites left for other neighborhoods and African Americans or Latinos came to dominate the once fiercely maintained turf.

Despite significant white flight, in the period since 1968 a select group of working-class urbanites, especially those abiding in areas identified as ethnic enclaves, remained fiercely attached to their neighborhoods and aggressively patrolled these boundaries, resisting minority incursion. Studies of ethnic neighborhoods in Yonkers, New York,<sup>33</sup> Boston, southern Brooklyn,<sup>34</sup> and Chicago<sup>35</sup> suggest that residents of several ethnic neighborhoods have reacted violently to minorities' attempts to integrate.

Perhaps the most vivid example of resistance to housing integration after the passage of the FHA occurred in Canarsie, a neighborhood in Brooklyn. In the 1970s, middle-class Blacks finally began moving to Canarsie, which previously had been settled predominately by Jews and Italians.<sup>36</sup> Canarsie was considered territory the groups were determined to protect. Some of the whites occupying Canarsie in the 1970s were longtime residents; a substantial number had moved to the area from other parts of New York City that had been integrated by Blacks and Hispanics.<sup>37</sup>

Protecting Canarsie became of paramount importance to its white residents. Block associations were formed to encourage homeowners to sell to whites. Attempts were made to recruit whites to the neighborhood to fill any vacancies and prevent African Americans from moving in. Canarsians also resorted to violence to protect their neighborhood. Houses of minorities who had moved to the neighborhood and also those of whites who had sold to minorities were firebombed.<sup>38</sup> After a Puerto Rican family moved to a block near Rockaway Parkway, where many working-class Italians lived, their new neighbors attributed a rash of storefront burglaries that occurred nearby to the newcomers.<sup>39</sup> A band of Italian boys ousted the Puerto Ricans. One of the individuals responsible for ejecting the Puerto Rican family boasted: "They were the filthiest family you'd ever seen, right out of Brownsville. We got them out of Canarsie. We ran right into the house and kicked the shit out of everyone."<sup>40</sup>

Exploring the roots of the resentment and anger toward minority integration

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33. See LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999) (describing fierce and violent white opposition to minorities moving into subsidized housing in Yonkers, New York).

34. See JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* (1985); Howard Pinderhughes, *The Anatomy of Racially Motivated Violence in New York City: A Case Study of Youth in Southern Brooklyn*, 40 SOC. PROBS. 478 (1993).

35. See WILLIAM JULIUS WILSON & RICHARD P. TAUB, *THERE GOES THE NEIGHBORHOOD: RACIAL, ETHNIC, AND CLASS TENSIONS IN FOUR CHICAGO NEIGHBORHOODS AND THEIR MEANING FOR AMERICA* (2006).

36. RIEDER, *supra* note 34, at 16.

37. *Id.*

38. *Id.* at 200.

39. *Id.* at 201.

40. *Id.*

in neighborhoods like Canarsie a decade later, Howard Pinderhughes, in an attempt to explain the dramatic increase in the number of racially motivated crimes in New York City, interviewed youth in southern Brooklyn about their racial attitudes.<sup>41</sup> The youth studied were drawn from several working-class white communities located in southern Brooklyn, including Gravesend, Bensonhurst, Sheepshead Bay, and Canarsie.<sup>42</sup> According to Pinderhughes, at the time these communities predominantly contained Italian-Americans living in stable, majority white neighborhoods.<sup>43</sup>

The youth interviewed by Pinderhughes were very mistrustful of Blacks<sup>44</sup> and quite concerned about maintaining the ethnic composition of their neighborhoods.<sup>45</sup> Pinderhughes noted that they believed they had the right and obligation to defend their territory against Blacks, in other words, “that it was up to them to ‘stop the Blacks.’”<sup>46</sup> If they attacked these outsiders, they would send a message to all Blacks from outside the neighborhood to stay out of the whites’ communities.<sup>47</sup>

Other research has shown that incidents involving attacks on minorities who strayed into white territory are not limited to ethnic enclaves. One report by the Southern Poverty Law Center (“SPL”), focusing on the period between 1985 and 1986, identified move-in-violence—violence directed at minority families moving to white neighborhoods—as the most common form of violent racism in the country.<sup>48</sup> According to the report, such violence was not limited to one particular area of the country and was in fact most acute in the North, the Midwest, and the West. The incidents documented in the report involved cross burnings, arson, fire bombings, the yelling of slurs, vandalism, and threatening calls and letters, all focused on driving minorities out of all white or predominantly white neighborhoods.<sup>49</sup>

In the 1990s, crimes committed because of the race of the victim began to be identified as hate crimes. Hate crimes are crimes motivated in whole or in part by the victim’s race, ethnicity, color, religion, or sexual orientation. Research suggests that perpetrators’ behavior in hate crime cases generally falls into one of three categories: thrill seekers, defensive crimes, and retaliatory crimes.<sup>50</sup> In

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41. Pinderhughes, *supra* note 34, at 478.

42. *Id.* at 480.

43. *Id.* at 482.

44. *Id.* at 483.

45. *Id.* at 484.

46. *Id.* at 485.

47. *Id.*

48. See SOUTHERN POVERTY LAW CENTER, “MOVE-IN” VIOLENCE: WHITE RESISTANCE TO NEIGHBORHOOD INTEGRATION IN THE 1980’s (1987).

49. *Id.*

50. *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism and Homeland Security of H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Jack McDevitt, Associate Dean, Northeastern University) (citing Jack McDevitt et al., *Hate Crime Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303 (2002)).

this regard, a further explanation offered by the authors is that perpetrators often commit hate crimes because they are motivated by a desire to defend their turf.<sup>51</sup> “A common example of defensive hate crimes involves harassment suffered by a Black family who moves into an all White neighborhood.”<sup>52</sup>

Examination of data on hate crimes in New York City and Boston suggests that race-based hate crimes were strongly linked to the migration of minorities to white neighborhoods. One study of all hate crimes identified by the Boston police over a three-year period in the 1980s identified “[m]oving into a neighborhood” as the third most likely cause of hate crime.<sup>53</sup> A separate study analyzing the location of hate crimes reported to the hate crimes unit within the New York City Police Department between 1987 and 1995 revealed that rates of racially-motivated crime against Asians, Latinos, and Blacks rose when minorities moved into white strongholds.<sup>54</sup> The researchers hypothesized that racially motivated crime stemmed from white residents’ battles to control areas they considered to be their territory.<sup>55</sup>

A variety of news accounts suggest that minorities living in or moving to white neighborhoods continue to be attacked. In 2007 alone, from the East Coast (New York and Philadelphia) to the West (California), in the South and Midwest, Black families experienced graffiti, arson, and verbal harassment committed by neighbors upon moving to white neighborhoods. The violence of the past thirty years is eerily similar to situations that are occurring now. For instance, in Philadelphia, Sean Jenkins, a Black construction worker, and his girlfriend made plans to rent a house in a quiet, predominately white neighborhood in December 2007. Immediately prior to their taking occupancy, white vandals broke first floor windows in the house and wrote on a wall, “‘All n[igger]s should be hung.’”<sup>56</sup> Later, when Jenkins’s girlfriend went to clean the house, a young white man yelled at her, “‘Y’all n[igger]s taking over the neighborhood!’”<sup>57</sup> After these events, the couple changed their minds about renting the house.

After the passage of the Fair Housing Act in 1968, many of the mechanisms that had been used to maintain housing segregation became legally prohibited.<sup>58</sup> Despite legal prohibitions on sundown towns for instance, in the 1990s citizens were still attempting to enforce such illegal prohibitions.<sup>59</sup> In addition, extralegal violence remained a common mechanism used by those resisting housing

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51. *Id.*

52. *Id.*

53. JACK LEVIN & JACK McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 246 (1993).

54. Donald P. Green et al., *Defended Neighborhoods, Integration, and Racially Motivated Crime*, 104 AM. J. SOC. 372, 397 (1998).

55. *Id.* at 373.

56. David Gambarcorta et al., *Advice About Racism Proved to Be Prophetic*, PHILA. DAILY NEWS, Dec. 14, 2007, at 6.

57. *Id.*

58. See MEYER, *supra* note 8, at 209-11.

59. LOEWEN, *supra* note 25, at 103.

integration. Another important break with the past is that in the post-1968 period, though mobs could and occasionally did gather to protest minority entry to all white or nearly all white residential areas, most of the resistance to integration was individual and nearly invisible—crimes committed in the middle of the night with no witnesses.<sup>60</sup> The next section discusses the FHA as a remedy for such violence.

## II. THE FAIR HOUSING ACT AND EXTRALEGAL VIOLENCE

### A. *Sections 3631 and 3617*

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, was created to provide fair housing throughout the United States.<sup>61</sup> As a broad remedy, it prohibits a variety of discriminatory housing practices, including extralegal violence.<sup>62</sup> The chapter focused particularly on violence is the “Prevention of Intimidation” subchapter, which contains § 3631.<sup>63</sup> Modeled after 18 U.S.C. § 245, with language that tracks that of 245(b),<sup>64</sup> § 3631 is one of several remedies targeted at crimes like those described in the previous section.<sup>65</sup> Section 3631 provides imprisonment or fine in the following context:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—  
(a) any person because of his race, color, religion, . . . or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling.<sup>66</sup>

The maximum penalty for violation under § 3631 is life in prison. Section 3631 also allows victims various other remedies under the FHA, including obtaining damages or injunctions for violations of § 3617, a section of the FHA which also

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60. See, e.g., Laura J. Lederer, *The Case of the Cross Burning: An Interview with Russ and Laura Jones*, in **THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE, AND PORNOGRAPHY** 27-29 (Laura Lederer & Richard Delgado eds., 1995) (describing cross burning directed at Black family who moved to white neighborhood occurring in the middle of the night without witnesses).

61. See Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619).

62. 42 U.S.C. §§ 3617, 3631 (2000). For a discussion of the legislative history surrounding the Fair Housing Act, see Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 *How. L.J.* 841, 843-910 (2005); Schwemm, *supra* note 6, at 757-66; Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 *ALA. L. REV.* 203, 222-39 (2006).

63. 42 U.S.C. § 3631 (2000).

64. **HATE CRIMES LAW** 193 (Thomson/West Editorial Staff eds., 2007).

65. 42 U.S.C. § 3631 (2000).

66. *Id.*

prohibits interference, intimidation, or coercion in the exercise of one's federal housing rights.<sup>67</sup>

The Fair Housing Act was passed in the wake of Dr. Martin Luther King, Jr.'s assassination in 1968. At that time, the House had passed a housing bill, with a separate bill being considered in the Senate.<sup>68</sup> Though there is little legislative history for the individual provisions,<sup>69</sup> comments made in the debate around the Senate version of the Act seem to suggest that it was passed with full acknowledgment of the problem of move-in violence.<sup>70</sup> Describing the need for the legislation the Senate Report noted:

[A] small minority of lawbreakers has resorted to violence in an effort to bar Negroes from exercising their lawful rights. Brutal crimes have been committed not only against Negroes exercising Federal rights but also against whites who have tried to help Negroes seeking to exercise these rights. Acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights.<sup>71</sup>

The same Senate report also noted the failure of local officials to solve and prosecute crimes of racial violence and their failure to obtain convictions.<sup>72</sup>

### *B. The Use of the FHA as a Remedy Against Move-in Violence*

Though move-in violence may take a variety of forms, ranging from the extremely physically violent to actions involving verbal harassment, many of the cases prosecuted under the FHA involve extremely violent conduct. Section 3631 of the FHA has been used to punish racially-motivated fire bombings and arsons,<sup>73</sup> cross burnings,<sup>74</sup> assaults,<sup>75</sup> and threats.<sup>76</sup>

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67. *Id.* § 3617.

68. For a detailed history of the passage of the Act, see Leonard S. Rubinowitz, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663 (2008).

69. See Schwemm, *supra* note 6, at 757-58.

70. See S. REP. NO. 90-721 (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1839.

71. *Id.*

72. *Id.* at 1839-40.

73. See, e.g., United States v. Craft, 484 F.3d 922, 924 (7th Cir. 2007) (arson); United States v. White, 788 F.2d 390, 392 (6th Cir. 1986) (arson); United States v. Redwine, 715 F.2d 315, 317 (7th Cir. 1983) (firebombing); United States v. Anzalone, 555 F.2d 317, 318 (2d Cir. 1977) (arson); United States v. Nix, 417 F. Supp. 2d 1009, 1009 (N.D. Ill. 2006) (firebombing); Stackhouse v. DeSitter, 566 F. Supp. 856, 858 (N.D. Ill. 1983) (firebombing).

74. See, e.g., United States v. May, 359 F.3d 683, 685 (4th Cir. 2004); United States v. Colvin, 353 F.3d 569, 571 (7th Cir. 2003) (en banc); United States v. Magleby, 241 F.3d 1306, 1308-09 (10th Cir. 2001); United States v. Whitney, 229 F.3d 1296, 1300 (10th Cir. 2000); United States v. Stewart, 65 F.3d 918, 921-22 (11th Cir. 1995); United States v. Montgomery, 23 F.3d 1130, 1131-32 (7th Cir. 1994); United States v. J.H.H., 22 F.3d 821, 823-24 (8th Cir. 1994); United

Many of the FHA cases involve acts of move-in violence directed at minorities who have moved to white neighborhoods. Frequently the intent of the perpetrators in these cases is to drive individuals out of the neighborhood.<sup>77</sup> In a majority of these cases, the defendants' desire for white space was crystal clear.<sup>78</sup> For example, in *United States v. Nichols*, the defendant Nichols, "a long-time resident of a formerly all-white neighborhood in Bessemer City, North Carolina," complained that Hispanics and African Americans had begun integrating his neighborhood.<sup>79</sup> Nichols and his associates made a point of "scream[ing] racial epithets at Hispanics and African-Americans who lived in the neighborhood."<sup>80</sup> One evening in July 1999, the victim, Julio Sanchez, and a friend, were assaulted by the defendants, who had previously yelled epithets at them, while they sat on the friend's front porch.<sup>81</sup> The defendants left only to return later with a pipe and a bat.<sup>82</sup> As they smashed the windows of trucks parked outside the house and the windows of the house, they screamed, "'Go back to Mexico. You done got all our damn jobs.'"<sup>83</sup>

Several of the move-in violence cases reflect the perpetrators' belief that if African Americans move to the neighborhood their own property will be worth less. In *United States v. Vartanian*, for example, the defendant was convicted for having threatened a real estate agent after she facilitated the purchase of a house in a formerly all white neighborhood in Harper Woods, Michigan, by an African-American family.<sup>84</sup> Standing outside the home, the defendant, who owned the property across the street from the seller, ran across the road and began ranting at the agents assembled there.<sup>85</sup> Vartanian insisted "that he would not have invested \$10,000 in a swimming pool in his yard had he known African Americans would move in across the street."<sup>86</sup>

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States v. Hayward, 6 F.3d 1241, 1243-44 (7th Cir. 1993), *overruled by Colvin*, 353 F.3d 569.

75. See, e.g., *United States v. Nichols*, 149 F. App'x 149, 150-151 (4th Cir. 2005); *United States v. McInnis*, 976 F.2d 1226, 1228-29 (9th Cir. 1992); *United States v. Wood*, 780 F.2d 955, 956-58 (11th Cir. 1986); *United States v. Johns*, 615 F.2d 672 (5th Cir. 1980).

76. *United States v. Vartanian*, 245 F.3d 609, 611-12 (6th Cir. 2001) (discussing threats of death and bodily injury directed at African Americans and real estate agents because of attempts to purchase a house in an all white neighborhood); *see also Nichols*, 149 F. App'x at 150-51; *Williams v. Derifield*, No. 04 C 5633, 2005 U.S. Dist. LEXIS 33367, at \*2-3 (N.D. Ill. Dec. 13, 2005).

77. See, e.g., *United States v. Hartbarger*, 148 F.3d 777, 780 (7th Cir. 1998); *Redwine*, 715 F.2d at 318.

78. See, e.g., *Vartanian*, 245 F.3d at 611-12.

79. *Nichols*, 149 F. App'x at 150-51.

80. *Id.* at 150.

81. *Id.*

82. *Id.*

83. *Id.*

84. *United States v. Vartanian*, 245 F.3d 609, 611-13 (6th Cir. 2001).

85. *Id.* at 612.

86. *Id.* The defendant also threatened to destroy the agent's car, and find the defendant's

Though the vast majority of the racially motivated cases prosecuted under § 3631 involve situations in which Asians, African Americans, or Latinos are victims, some of the cases involve whites who have been targeted for race-based hate crimes. When whites are targeted in this context, the perpetrators tend to be motivated by anger at the victim's interaction or association with racial and ethnic minorities. The association that most often triggers a violent racial attack is developing a family with a person of color, for instance, as part of an interracial couple.<sup>87</sup> Lesser associations such as friendship may also prompt racial attacks.<sup>88</sup> In one rather unusual case a defendant was convicted under § 3631 for sending letters threatening the white head of an adoption agency who was trying to place African-American and Asian children with white adoptive families.<sup>89</sup>

Remedies protecting housing rights are a crucial part of civil rights law. In fact, housing related violence is the most common form of racial violence prosecuted by the Justice Department.<sup>90</sup> With respect to anti-integrationist violence, behavior directed at racial and ethnic minorities integrating white neighborhoods may be punished under a variety of types of federal and state law.<sup>91</sup> The broad protections against interference under the FHA have been used to prosecute racial violence in a variety of contexts. For instance, §§ 3617 and 3631 of the FHA have been used to prosecute a variety of violent acts, including cross burnings, fire bombings, vandalism, assault, and threats targeted at racial and ethnic minorities and whites in the exercise and enjoyment of their fair

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family and "chop them into little pieces, and bury them in the backyard where nobody would ever find them." *Id.*

87. *See, e.g.*, *United States v. May*, 359 F.3d 683, 685 (4th Cir. 2004) (examining a case where a cross was burned on the lawn of a white woman who lived with a Black man); *United States v. Magleby*, 241 F.3d 1306, 1308-09 (10th Cir. 2001) (examining a cross burning at the home of an interracial family); *United States v. Sheldon*, 107 F.3d 868 (4th Cir. 1997) (unpublished table decision) (affirming the defendant's conviction for burning a cross on the front lawn of an interracial couple's house); *United States v. Wood*, 780 F.2d 955, 956-59 (11th Cir. 1986) (affirming the defendant's conviction for breaking into interracial couples' homes and assaulting them because of their relationship); *United States v. Johns*, 615 F.2d 672, 674 (5th Cir. 1980) (finding that the defendant terrorized an interracial couple).

88. *United States v. Hayward*, 6 F.3d 1241, 1243-44 (7th Cir. 1993), *overruled by* *United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003) (involving a defendant convicted under § 3631 for burning two crosses on the property of a white family who had entertained Black friends); *Wood*, 780 F.2d at 956-59 (finding that a white woman was beaten for having associated with Blacks).

89. *United States v. Gilbert*, 884 F.2d 454, 455-56 (9th Cir. 1989).

90. *HATE CRIMES LAW*, *supra* note 64, at 191.

91. When the facts in the case satisfy the requirement for conspiracy, the Justice Department also prosecutes cross burning and other forms of bias-motivated interference with housing rights under 18 U.S.C. § 241 as a conspiracy to interfere with housing rights. For a detailed description of the various legal remedies targeted at move-in violence, see Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 54-66 (2007).

housing rights.

### III. THE FUTURE OF FHA EXTRALEGAL VIOLENCE CASES

The FHA had broadly integrationist aims. A broad reading of the FHA's legislative history suggests the Act was an attempt to pave the way for significant nationwide housing integration. Even the narrowest reading of the FHA suggest that it is, at minimum, aimed at the use of extralegal violence as a barrier to integration. As Part II suggests, recently the Act has been interpreted by courts that limit its use in move-in violence cases. If courts continue to interpret the FHA in this manner, there are important consequences for the racial balance of neighborhoods. For instance, segregation among African Americans, the most segregated racial group in the country, has declined but still remains high, with residential segregation among African Americans in many major cities identified as severe.<sup>92</sup> As so many of the cases brought under the FHA reveal, when minorities move to white neighborhoods and crimes are committed against them, they leave.<sup>93</sup> Thus, forty years after the passage of the FHA, extralegal violence still serves as a barrier to housing integration. This Part attempts to suggest why this remains the case, given the existence of such a remedy.

#### A. *What Really Counts as Intimidation?*

Section 3617 of Title 42 makes it unlawful for persons to coerce, intimidate, or threaten others in the exercise or enjoyment of their fair housing rights.<sup>94</sup> As detailed above, in the past the FHA has been used to prosecute "typical" acts of move-in violence—violent harassment aimed at minorities and others who moved to and were living in white neighborhoods. Until recently, few cases have defined either: 1) the precise conduct that constituted intimidation<sup>95</sup> or 2) whether the Act could be applied to individuals who have already purchased housing. A series of recent court decisions, address these issues in a manner which raises the concern that the FHA may be interpreted in ways that significantly blunt its ability to address anti-integrationist violence.

Though the decision was subsequently reversed on appeal, the trial court's opinion in *Ohio Civil Rights Commission v. Akron Metropolitan Housing*

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92. Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL'Y 49, 58 (2006) (asserting that as of the 2000 Census segregation levels for Blacks and Hispanics measured against whites were consistently moderate to severe in America's ten largest cities); *see also* John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 608-09 (2008); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 799-800 (2008).

93. *See, e.g.*, United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993); United States v. Stewart, 806 F.2d 64 (3d Cir. 1986); United States v. Redwine, 715 F.2d 315 (7th Cir. 1983).

94. 42 U.S.C. § 3617 (2000).

95. HATE CRIMES LAW, *supra* note 64, at 203.

*Authority*<sup>96</sup> serves as a cautionary tale for courts interpretation of the Fair Housing Act as a remedy for move-in violence cases. The case involved Harper, an African American who lived in a housing development operated by the Akron Metropolitan Housing Authority ("AMHA"). Harper had lived in the development for ten years when Beverly Kaisk, a Caucasian woman, moved to an apartment two doors away from Harper.<sup>97</sup> Harper claimed that shortly after the Kaisks moved in, Kaisk and her two children began to harass the Harpers and their African-American visitors, calling them "niggers" and "black bitches."<sup>98</sup> Such incidents, according to Harper were not isolated and included physical confrontation and threats of violence. Harper complained to the AMHA, to no avail.<sup>99</sup>

In its defense against the suit, the AMHA contended that it bore no responsibility for the hostile environment.<sup>100</sup> Rather, the hostile environment, if it existed, was created by the Kaisks.<sup>101</sup> The defendants placed heavy reliance on *Lawrence v. Courtyards at Deerwood Ass'n*.<sup>102</sup> In *Lawrence*, African-American homeowners sued their homeowners' association after it refused to get involved when they experienced racially-motivated harassment soon after they moved to the residential development.<sup>103</sup> The homeowners' association claimed that they were unwilling to "become involved in a personal dispute between neighbors."<sup>104</sup> In *Lawrence*, the court granted the association's motion for summary judgment on the interference claim because it indicated the defendants had no duty to stop the neighbors' conduct, and the association did not engage in threatening behavior toward the homeowners.<sup>105</sup>

In *Ohio Civil Rights Commission*, the court granted the defendant's motion for summary judgment.<sup>106</sup> In deciding that the alleged harassment was not sufficiently severe, Judge Stormer noted that courts allowing claims for racial discrimination under the FHA have limited its application to "only the most extreme or violent conduct."<sup>107</sup> The court noted:

"On one side lie cross-burning, fire-bombing and other similarly overt discriminatory acts designed to intimidate, coerce, or interfere with housing rights. On the other side lie unfortunate skirmishes between

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96. No. CV 04-06-3416, 2005 WL 5957624 (Ohio Ct. Com. Pl. Dec. 22, 2005), *rev'd*, 866 N.E.2d 1127 (Ohio Ct. App. 2006), *appeal allowed by* 825 N.E.2d 912 (Ohio 2007).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133, 1137 (S.D. Fla. 2004).

103. *Id.*

104. *Id.* at 1143.

105. *Ohio Civil Rights Comm'n*, 2005 WL 5957624.

106. *Id.*

neighbors, tinged with discriminatory overtones or occasional discriminatory comments. Nothing in the text of the FHA or the case law interpreting it indicates that Congress intended to federalize the latter type of dispute.”<sup>107</sup>

The Ohio judge’s decision did not demonstrate adequate appreciation for the context and the effect of move-in violence. Acts of neighbor terrorism frequently begin with incidents of harassment that have a low offense level but are terrifying, nevertheless—vandalism or the use of slurs and epithets. Judge Stormer fails to recognize the power that use of slurs may have in the context of the racial integration of neighborhoods. If Judge Stormer’s reasoning represents a trend, the ability of the FHA to serve as a remedy in cases of anti-integrationist violence is seriously undermined. If other courts begin requiring cross burning or firebombing in order to secure relief under the FHA, there may be two negative effects. First, it may inadvertently send a message that the perpetrators have carte blanche to racially harass, so long as a cross is not burned or the victim’s house is not firebombed. Second, it may encourage victims to stay, as events escalate.

Recent court interpretations of who may exercise rights with respect to the FHA, is similarly troubling. As others have noted,<sup>108</sup> in one recent case, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, the Seventh Circuit severely limited the reach of who may utilize the Fair Housing Act.<sup>109</sup> *Halprin* was the typical move-in violence case. Rick Halprin, who was Jewish moved to Dearborn Park with his wife. Soon after their arrival, the president of the neighborhood association wrote H-town (short for “Hymie town”) on the Halprins’ property.<sup>110</sup> As is frequent in cases of move-in violence, other acts of vandalism followed, with damage to landscaping and cutting down holiday lights.<sup>111</sup> All of the Halprins’ attempts to find the perpetrator of the harassment directed at them were thwarted by the association.

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107. *Id.* (quoting *Walton v. Claybridge Homeowners Ass’n*, No. 1:03-CV-69-LJM-WTL, 2004 U.S. Dist. LEXIS 946, \*21-22 (S.D. Ind. Jan. 22, 2004)); *see also* *Gourlay v. Forest Lake Estates Civic Ass’n*, 276 F. Supp. 2d 1222, 1236 (M.D. Fla. 2003) (explaining that the FHA should not become “an all purpose cause of action for neighbors of different races, origins, faiths . . . to bring neighborhood feuds into federal court when the dispute has little or no actual relation to housing discrimination”), *vacated*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003).

108. *See, e.g.*, Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008); Schwemm, *supra* note 6, at 727-31; Short, *supra* note 62.

109. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004); *see also* *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. H-05-3197, 2005 U.S. Dist. LEXIS 25597, at \*12 (S.D. Tex. Oct. 19, 2005); *Gourlay*, 276 F. Supp. 2d at 1236. For a discussion of this in *Halprin*, see Schwemm, *supra* note 6, 727-31.

110. *Halprin*, 388 F.3d at 327.

111. *Id.*

Though the harassment the Halprins received was typical of many other successful move-in violence cases brought under the FHA, in affirming the dismissal of their case under § 3604, Judge Posner, maintained the FHA did not apply to the Halprins' situation. He noted that of several sections of the Fair Housing Act (§§ 3603, 3604, 3605, 3606) the only section applicable was § 3604, which focuses on the act of selling or purchasing a home. "The language indicates concern with activities, such as redlining, that prevent people from acquiring property. . . . Our plaintiffs, however, are complaining not about being prevented from acquiring property but about being harassed by other property owners."<sup>112</sup> In other words because the Halprins were harassed after they moved in, rather than before they acquired the property, they were not eligible for relief under the FHA. Making light of the harassment directed at the Halprins, Posner concluded, "we do not think Congress wanted . . . to convert every quarrel among neighbors in which a racial or religious slur is hurled into a federal case."<sup>113</sup>

Taken together, cases like *Halprin*, *Ohio Civil Rights Commission*, and *Lawrence* create a picture of what counts as intimidation that is sharply at odds with the phenomenon of move-in violence that scholars have documented. Move-in violence often involves the use of slurs and property damage, like the Halprins' experience. Second, by definition, such violence is directed at individuals after they have moved to a neighborhood. Often it is moving in that prompts neighbors to react. To not allow relief under the FHA for individuals once they have moved in, may substantially diminish, if not entirely eliminate the FHA as a remedy for victims of anti-integrationist violence.

### *B. Looking Toward the Future*

Admittedly, at this point in time, decisions adopting the same perspective as *Halprin*, *Lawrence*, and *Ohio Civil Rights Commission* are fairly rare. As I suggest above, if these decisions represent a trend, courts have created a definition of intimidation that excludes the real-life situations of many who integrate white neighborhoods. Even if these decisions do not represent new directions for the courts, the picture is more positive, but not necessarily rosy, because the FHA remains an underutilized remedy.<sup>114</sup> In the extralegal violence context, this may be especially true. Though it is impossible to say precisely how many individuals are intimidated while exercising their housing rights, it seems clear that there are many more incidents appropriate for charges than there are charges filed. For instance, the FBI identified 4000 racially motivated hate

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112. *Id.* at 329.

113. *Id.* at 330.

114. See, e.g., John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1514-15 (1993); Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and the Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE: J. POL'Y DEV. & RES. 171 (1999).

crimes in 2006.<sup>115</sup> Hate crime experts suggest that large percentages of such crimes occur in and around the victims' homes.<sup>116</sup>

One of the reasons for this may be that in cases of move-in or other types of anti-integrationist violence, criminal charges may be seen as the most obvious and, for prosecutors, the easiest, types of remedies. If families do not know that they have civil rights relief available to them, they may not press for legal relief. More importantly, cases of anti-integrationist violence are physically threatening and have a great effect on the families at whom they are directed. In the wake of incidents, families may often move away or, if they have not yet moved in, nullify their purchase or rental of the living space in the neighborhood where the incident occurred. In a new house, and a different neighborhood, individuals may feel disinclined to revisit the crime by pursuing civil rights actions.

Actions like the defacing of Quinetta May's home are so threatening because they self-consciously invoke a well-known history of violence directed at minorities who "stepped out of line." In the Reconstruction South, for instance, minorities who transgressed social boundaries were lynched. Though it has been decades since Blacks were lynched, moving to white neighborhoods may feel to some minorities as if they are crossing some sort of invisible color barrier. Contemporary incidents, even if there are proportionally few of them, reinforce the notion that minorities who move to white neighborhoods are breaking some sort of color barrier. If an incident happens, it becomes hard not to see it as a message that the minority family does not belong. It is not surprising, therefore, that many minorities victimized by move-in violence leave the neighborhood.

There may, however, be a way to prevent minorities from leaving in the wake of move-in violence. If the incident does not represent the feelings of others in the neighborhood, neighbors can and should communicate this to the family. If a city has a specialized police unit to investigate hate crimes, such incidents should be investigated, even if as vandalism they would not normally garner much attention. In other words, in sharp contrast to the perpetrator's intended message, everything should be done to demonstrate to the family that they moved to a place where they do belong.

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115. See U.S. Dep't of Justice, Fed. Bureau of Investigation, 2006 Hate Crime Statistics, Incidents, Offenses, Victims, and Known Offenders by Bias Motivation (Nov. 2007), <http://www.fbi.gov/ucr/hc2006/table1.html>.

116. See generally LEVIN & McDEVITT, *supra* note 53.



# FAIR HOUSING AND COMMUNITY DEVELOPMENT: TIME TO COME TOGETHER

ELIZABETH K. JULIAN\*

## INTRODUCTION

Forty years ago, shortly before the passage of the Fair Housing Act,<sup>1</sup> the National Advisory Commission on Civil Disorders, more generally known as the Kerner Commission, famously declared that the country was “moving toward two societies, one black, one white—separate and unequal.”<sup>2</sup> The Commission urged, among other things, the enactment of a “comprehensive and enforceable federal open housing law.”<sup>3</sup> It recognized, however, that many poor people of color were locked in the ghettos of the inner city by a poverty that had its roots deep in the soil of segregation and that discrimination and prejudice in the public and private housing markets would not abate overnight.<sup>4</sup> The report concluded that “no matter how ambitious or energetic the program, few Negroes now living in central cities can be quickly integrated” and called for large scale “enrichment” of the Black ghetto as an adjunct strategy to address the findings regarding race, housing, and community conditions in America.<sup>5</sup>

Two months after the Kerner Commission issued its report and call for action, Congress passed the Fair Housing Act.<sup>6</sup> While the bill was not the

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1. The Fair Housing Act became law on April 11, 1968. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)).

2. REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS (1968) [hereinafter KERNER REPORT]. President Johnson appointed the Kerner Commission on July 28, 1967, to investigate urban riots in the United States that began in the summer of 1965 and brought civil disorder to black sections of many major cities, including Los Angeles (1965), Chicago (1966), and Newark (1967). *See id.* The Commission concluded in March 1968 that urban violence reflected the profound frustration of inner-city blacks and that racism was deeply embedded in American society. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)). *See generally* Leonard S. Rubinowitz & Kathryn Shelton, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom*

“comprehensive and enforceable federal open housing law” urged by the report, the sponsors hoped that its passage would usher in a society in which residential segregation would no longer define American housing patterns and community landscape.<sup>7</sup> It was the last major piece of civil rights legislation of the 1960s and struck at the heart of our attitudes about race: who could live next door.<sup>8</sup> It was long overdue.

However, passage of the Fair Housing Act, which came in the wake of the assassination of Dr. King on April 4, 1968, did not abate white resistance to residential integration.<sup>9</sup> Progressives quickly turned to the second recommendation of the Kerner Commission, “enrichment” of the black ghetto, to address the problems that existed in minority communities as a result of Jim Crow.<sup>10</sup> During the 1968 presidential campaign, when Robert Kennedy, vying for the Democratic Party nomination, proposed “community development” as a counter to Eugene McCarthy’s support for letting minorities move to white areas, it was seen by some as a crass political move.<sup>11</sup> But it was also a practical and realistic effort to respond to the frustration felt by many blacks who saw their communities struggling with the legacy of segregation: extreme poverty, dilapidated and deteriorating housing stock, inadequate public services, and little or no investment—much less re-investment—by the public or private sectors. Place-based community development initiatives appeared to offer a more empowering way for people of color to deal with the harms of segregation, one that did not require the receptiveness of white people. While it would entail public expenditure, it meant that blacks would be staying where they belonged, and not demanding to come where they did not, i.e., white neighborhoods. For white liberals, it provided a respectable alternative to taking on a fight that was both socially uncomfortable and politically difficult. The modern community development movement was born.

The fundamental rights that the Fair Housing Act explicated were already

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*Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663 (2008).

7. CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960*, at 47-50 (2005).

8. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)); Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2000)).

9. Indeed, white resistance to the appearance of non-white neighbors, particularly in the form of affordable housing, has been a longstanding, continuing part of life in most American cities to this day. See John M. Goering, *Introduction to HOUSING DESEGREGATION AND FEDERAL POLICY* 9, 9 (John M. Goering ed., 1986)); see also Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 545-46 (2008); Rubinowitz & Shelton, *supra* note 6, at 675-76; see generally STEPHEN GRANT MEYER, *AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002) (reviewing MEYER, *supra*).

10. KERNER REPORT, *supra* note 2.

11. See ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 910-11 (1978).

imbedded in our Constitution and legal rulings before they were recognized by the people's representatives.<sup>12</sup> The Fair Housing Act was nevertheless an important statement of national purpose. However, forty years after the passage of the Fair Housing Act, the dream of its sponsors has not been realized. In many ways segregation seems more entrenched than ever, particularly, but not exclusively, for lower income people of color.<sup>13</sup> Moreover, discrimination continues to limit housing choice for people of color at every income level.<sup>14</sup> The reasons for that can be debated, but the reality of it cannot. Neither can the relationship between geography and opportunity. Today it is truer than ever that where you live determines what sort of life chances you and, perhaps more importantly, your children will have, and where you live depends a great deal on your race and income.<sup>15</sup>

It is at the intersection of race and poverty where the fair housing and community development movements have had their greatest challenges.<sup>16</sup> Both are progressive movements seeking to address either explicitly or implicitly the negative impact that racial segregation and discrimination had on minority individuals and communities. However, over the past forty years, neither movement has been individually successful in either creating open and inclusive communities of opportunity or making separate equal. At best the movements have seemed to operate in parallel universes and, at worst, have reflected tension

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12. See 42 U.S.C. § 1982 (2000); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *see also* LAMB, *supra* note 7, at 18.

13. While a great deal has been written on the difficult problem of housing segregation, three books authored or compiled between 1986 and 2005 provide a comprehensive look at our segregated condition and the role that public policy has played in both perpetuating as well as seeking to eradicate it. The following three books should be the starting place for anyone seeking to understand the issue and contribute constructively to addressing it. *See generally* HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 9 (providing an insider's perspective of the role that federal housing policy has played historically in both creating and perpetuating housing segregation, with attention to the political environment in which that has occurred); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (providing the definitive work on the role housing segregation has played to create minority "underclass"); THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA (Xavier de Souza Briggs ed., 2005) [hereinafter THE GEOGRAPHY OF OPPORTUNITY] (offering a comprehensive look through a compilation of essays at the way our continued segregated condition operates to prevent access to opportunity for people of color as compared to white people even as we grow more racially and ethnically diverse by the day, with particular emphasis on the need for new public policy attention to the issue of housing segregation).

14. See MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HOUSING DISCRIMINATION STUDY 2000, at 8-1 to -12 (2002), available at <http://www.huduser.org/publications/hsgfin/phase1.html>.

15. See Xavier de Souza Briggs, *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in THE GEOGRAPHY OF OPPORTUNITY, *supra* note 13, at 35-37.

16. See MASSEY & DENTON, *supra* note 13, at 142; *see generally* THE GEOGRAPHY OF OPPORTUNITY, *supra* note 13.

and even conflict that belie their common commitment to social and racial justice. That tension is clearly related in part to the perceived inconsistency between the goal of “integration” and the goal of strengthening existing minority communities. But is it also related to the reality of scarce resources? The fundamental principles of housing choice and equal opportunity appear to collide with the perceived need to focus those scarce resources, particularly federal housing dollars, on community revitalization work. However, this is a false dichotomy. Fair housing and community development are two sides of the same coin. They grew out of the need to address the twin evils of Jim Crow: separate and unequal. It is the thesis of this Article that the two goals are best advanced together.

This Article begins in Parts I and II by setting out the contexts of the births of the fair housing and community development movements, respectively. Part III looks at the efforts toward and attitudes about the creation of an open, inclusive society that impacts racial housing patterns. The tensions between the fair housing/civil rights advocates and community development advocates are examined in Part IV in the context of Public Housing/HOPE VI Program, the Low Income Housing Tax Credit Program, and local zoning and land use policies. Finally, Part V calls for a “coming together” of all low-income housing advocates in a way that provides for true housing choice regardless of race and income.

## I. THE FAIR HOUSING MOVEMENT

*We’re going to make this an open city, because it’s right. We’re going to make it an open city, because it’s practical. We’re going to make it an open city, because it’s sound economics. We’re going to make it an open city, because we’re tired of being humiliated.*—Rev. Dr. Martin Luther King, Jr. Chicago 1966.<sup>17</sup>

The modern fair housing movement, theoretically empowered by passage of the Fair Housing Act, has not made significant strides toward creating a nation of open and inclusive communities of opportunity.<sup>18</sup> There are, no doubt, many

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17. Rob Breymaier, *Affirmative Furthering of Fair Housing: The 21st Century Challenge*, *POVERTY & RACE*, May-June 2007, at 10, 10.

18. See MASSEY & DENTON, *supra* note 13, at 224; Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456-57, 471 (2007) [hereinafter Schwemm, *Why Do Landlords Still Discriminate?*] (stating that “[t]he most recent nationwide study by [HUD], based on thousands of paired tests in dozens of metropolitan areas in 2000, showed that, in rental tests, whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time. The rate of rental discrimination against Hispanics was actually higher than had been shown in a similar study in 1989, and the 2000 figure for blacks was down only a few percentage points compared to its 1989 counterpart”) (footnote omitted); see also Robert G. Schwemm, Cox, Halprin, and *Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 718 n.4, 718-19 (2008); Margery Austin Turner, *Limits On Housing and*

reasons for that, including ambivalence about the goal of racial integration. Certainly, the political environments in which the movement has operated over the past forty plus years and the shortcomings of the Act itself, particularly related to enforcement, contributed as well.<sup>19</sup> The Act reflected the difficult compromises involved in securing its adoption, and it was never as effective of a tool to promote real residential integration or to deal with the complicated legacy of segregation at the community level as proponents had hoped.<sup>20</sup> This has been due, in part, to the relatively singular focus of the fair housing movement on individual acts of discrimination in real estate-related transactions and its failure to effectively collaborate with other community-based social justice efforts in the face of governmental policies that reinforce segregation at every turn.<sup>21</sup>

However, the overarching failure has been that of political will. The alchemy of race and housing has seldom produced a politician's finest moments, nor our people's.<sup>22</sup> The failures have been, and continue to be, bi-partisan failures.<sup>23</sup> Segregation by race and income presents the progressive community with one of its greatest challenges, and our response in the coming decades will determine the country we become.

## II. THE COMMUNITY DEVELOPMENT MOVEMENT

Despite forty years of work, the investment of considerable public and private resources, and greater political support than the fair housing movement, the community development movement working in low-income minority

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*Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 797-800 (2008).

19. See LAMB, *supra* note 7, at 41-42; MASSEY & DENTON, *supra* note 13, at 195-216.

20. LAMB, *supra* note 7, at 41-42.

21. See Schwemm, *Why Do Landlords Still Discriminate?*, *supra* note 18, at 460-72; Mara S. Sidney, *Fair Housing and Affordable Housing Advocacy: Reconciling the Dual Agenda*, in THE GEOGRAPHY OF OPPORTUNITY, *supra* note 13, at 266-67.

22. An exception was Vito Marcantonio's speech on the floor of the House of Representatives during the debate over the 1949 Housing Act. I VOTE MY CONSCIENCE: DEBATES, SPEECHES AND WRITINGS OF VITO MARCANTONIO 1935-1950, at 307-08 (Annette T. Rubinstein & Assocs. eds., 1956) [hereinafter MARCANTONIO]. At issue was whether to permit racial segregation in the public housing that would be created by the bill. *Id.* at 307. Liberal Democrats, fearful that to do so would cause the bill to fail, rejected his plea to amend the bill to prohibit racial segregation. *Id.* The bill passed, and segregation in federally funded low-income housing was the rule. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 12 U.S.C. § 1701h (2000) and scattered sections of 42 U.S.C.); see generally Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal: The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 668-71 (1989) (discussing arguments for choosing not to seek relief from racial segregation).

23. See LAMB, *supra* note 7, at 165-203.

communities has failed to make separate equal.<sup>24</sup> Critics have faulted the community development movement for overlooking the role of race in creating unacceptable living conditions and limited opportunities in many low-income communities.<sup>25</sup> While a plethora of public and private programs and associated resources have “targeted” struggling low-income communities for “revitalization,” the conditions in underserved minority neighborhoods were rarely dressed *as legacies of segregation*.<sup>26</sup> The reluctance to do so and to employ strategies, including litigation, which seek remedies for racial discrimination and the structural conditions that it begat have resulted in the movement’s limited effectiveness.<sup>27</sup> In criticizing the community “revitalization” movement for not taking “structural racism and social class inequality” into account in either defining the problem or formulating solutions, Henry Louis Taylor, Jr. suggests a new way of thinking about community development.<sup>28</sup> This perspective acknowledges that the adverse conditions in low income communities have often resulted from decades of illegal racial and class-based segregation.<sup>29</sup> Remedies must therefore be structural and comprehensive in nature, and the demand for them must derive its legitimacy from civil rights law, not just moral or political authority.<sup>30</sup>

### III. AMIABLE APARTHEID

During the past forty years, the importance of eradicating segregation and the value of living in diverse communities have been challenged and debated. In addition to white attitudes, ambivalent at best and hostile at worst, minority attitudes, which have always rightly found offensive any notion that they must live among whites to be able to access equal opportunity, have increasingly grown tired of the effort—an attitude that Sheryll Cashin describes clearly in her

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24. See Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, at § 6, 27.

25. See generally Alice O’Connor, *Historical Perspectives on Race and Community Revitalization*, ASPEN INST., <http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/9OConnor.pdf> (last visited Apr. 9, 2008).

26. See Phil Tegeler, *Segregation in Housing Programs*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 13, at 203-05 (discussing the Community Reinvestment Act and civil rights concerns); see also Elizabeth Julian, *An Unfinished Agenda: Why It’s Time for Fair Housing and Community Development to Reunite to Fight the Vestiges of Segregation*, SHELTERFORCE, Winter 2007, <http://www.nhi.org/online/issues/152/unfinishedagenda.html> (discussing why it is time for the fair housing and community development movements to reunite to fight the vestiges of segregation).

27. See Julian, *supra* note 26.

28. HENRY LOUIS TAYLOR, JR. & SAM COLE, CTR. FOR URBAN STUDIES, *STRUCTURAL RACISM AND EFFORTS TO RACIALLY RECONSTRUCT THE INNER-CITY BUILT ENVIRONMENT* 1 (2001), <http://www.thecyberhood.net/documents/papers/taylor01.pdf>.

29. See *id.* at 5-6.

30. See generally TAYLOR & COLE, *supra* note 28.

book, *The Failures of Integration*.<sup>31</sup> It may be argued that we have not sufficiently/meaningfully attempted integration, but in any event the appetite for dealing with the issue of segregation in the early part of the twenty-first century is not hearty. Despite sometimes sympathetic rhetoric and token efforts, significant segments of the progressive community—including anti-poverty, affordable housing, and environmental advocates, following in the footsteps of their community development counterparts—have not embraced the principle of fair housing and an open society as an essential component of their work.<sup>32</sup> Moreover, conservative whites, hardly enthusiastic supporters of the goals of the Fair Housing Act in the first place, have been happy to watch “those people” struggle to deal with the effect of segregation and the structural racism that it begat in “their” communities from across the tracks, the river, the levee, or whatever “natural” divide separates those who have from those who have not, secure in their belief that no political will exists to bridge or breech it.<sup>33</sup>

Along with the demographic data that shows our continuing segregated condition,<sup>34</sup> recent academic studies and legal developments have reinvigorated those who would argue that the goal of an integrated society is utopian at best and undesirable or even illegal at worst. The Supreme Court’s recent decisions in the Seattle and Kentucky public education cases have, in an almost complete rejection of the heart and soul of *Brown v. Board of Education*,<sup>35</sup> limited the most reasonable voluntary tools to address racial segregation in public education.<sup>36</sup> Arguments in the briefs filed by amici curiae on behalf of fair housing and civil rights groups regarding the effects of housing segregation on the ability to desegregate public schools were generally ignored by the Court.<sup>37</sup> The silver lining may be, however, that by erecting barriers to voluntary local efforts to provide desegregated educational opportunities, the Court’s decision has put the issue of housing segregation back on the national agenda.<sup>38</sup>

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31. SHERYLL CASHIN, THE FAILURES OF INTEGRATION 17-28 (2004).

32. See, e.g., ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 1 (1990), available at <http://www.ciesin.org/docs/010-278/010-278chpt1.html>.

33. *Id.*

34. See U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, at 15 (2002), [http://www.censusbureau.biz/hhes/www/housing/housing\\_patterns/pdf/paa\\_paper.pdf](http://www.censusbureau.biz/hhes/www/housing/housing_patterns/pdf/paa_paper.pdf) (showing continued patterns of segregation, though overall incremental declines for all groups in segregation indices with blacks remaining the most segregated of all groups); see also Briggs, *supra* note 15, at 17, 22-29 (observing the continuing “distressingly high” levels of absolute segregation of blacks).

35. 347 U.S. 483 (1954).

36. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (Roberts, C.J.).

37. Brief of Amici Curiae Housing Scholars and Research & Advocacy Organizations in Support of Respondents, *Parents Involved*, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927078.

38. See generally *Parents Involved*, 127 S. Ct. 2738; see generally Julian, *supra* note 26, at 20.

The recent research of Robert Putnam, based upon an extensive survey taken at the time of the 2000 Census of people living in a range of diverse and homogenous environments, has likewise given succor to those who would declare the goal of an integrated society unworthy.<sup>39</sup> Putnam concludes, he says reluctantly, that at least in the “short run” living in a racially and ethnically diverse environment is stressful and difficult.<sup>40</sup> He finds that such environments result in loss of a sense of community and cause us to withdraw from desirable social interaction to stay at home and watch T.V.<sup>41</sup>

Not surprisingly, these rather grim research findings have resulted in widespread discussion in the popular media and communication venues suggesting that the national belief in the value of diversity is misplaced. As one major newspaper characterized the Putnam findings: “diversity hurts civic life.”<sup>42</sup> Another commentator opined: “Greater Diversity Equals More Misery.”<sup>43</sup> While Putnam’s research will likely be used in connection with the debate on immigration, it also poses serious issues given our already diverse population and projections that we will become increasingly so regardless of immigration policies.<sup>44</sup> A critique of the conclusions and methodology of the research is beyond the scope of this Article, but a discussion of its implications for fair housing and open communities is not. If we are not currently comfortable living in racially and ethnically diverse environments, does the research suggest that we can never be so? Does it suggest that we would be happy, socially and civically engaged citizens if we were just allowed to retreat to our racial or ethnic enclaves? And, if so, can society choose policies that foster that condition if they only serve to undercut our ideal of a free, open society where people can choose where to live, regardless of race? The implications of the Putnam research are not so much about the validity of its conclusions about our *present*, which after all capture attitudes toward race less than fifty years after we outlawed official segregation. They are about what sort of *future* we believe is possible. Can we continue to honor the principles of our Constitution and laws, and acknowledge the mistakes of our past, if we embrace segregation as a goal for our future?

Another instance of research being used to argue against policies that support racial and economic integration is found in the recent work on HUD’s Moving

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39. See generally Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9477.2007.00176.x>.

40. *Id.* at 149-51.

41. *Id.*; James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575, 599-600 (2008).

42. Michael Jonas, *The Downside of Diversity*, BOSTON GLOBE, Aug. 5, 2007, at D1.

43. Ilana Mercer, *Greater Diversity Equals More Misery; Harvard Political Scientist Robert Putnam Has Found That Diversity Is Not a Strength, but a Weakness*, ORANGE COUNTY REG., July 22, 2007, <http://www.ocregister.com/opinion/putnam-diversity-social-1781099-racial-greater>.

44. See generally DEP’T OF COMMERCE & U.S. CENSUS BUREAU, DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995 TO 2050, at 1-3 (1999), available at <http://www.mbdia.gov/documents/unpubtext.pdf>.

To Opportunity (MTO) Demonstration<sup>45</sup> that concluded that “[a]t least for the children in the Moving to Opportunity experiment, the promise that better neighborhoods would bring greater academic achievement has thus far gone unfulfilled.”<sup>46</sup> These findings again have prompted calls for an end to initiatives that create opportunities for those who are poor to live among those who are not poor (and, implicitly, racial minorities to live among whites).<sup>47</sup> MTO was designed in response to research regarding the effect of the *Gautreaux* housing mobility program in Chicago, part of the remedy in a public housing desegregation lawsuit, *Gautreaux v. Chicago Housing Authority*.<sup>48</sup> The *Gautreaux* program, because it was a remedy in a civil rights lawsuit, was explicitly designed to remedy racial discrimination.<sup>49</sup> Families choosing a housing mobility remedy moved to both lower poverty and non-minority suburban neighborhoods and communities.<sup>50</sup> Unlike *Gautreaux*, MTO did not include a racial component to the movers’ opportunities.<sup>51</sup> Many MTO participants who moved to lower poverty areas continued to live in overwhelmingly minority communities, a point particularly worth noting given the relation of racial geography to opportunity so compellingly set out in *The Geography of Opportunity*.<sup>52</sup> The *Gautreaux* research gives a more positive

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45. The Moving To Opportunity experiment was a demonstration program implemented during the 1990s by HUD to study the effects of low-income families moving from high poverty areas to low poverty areas. *See generally* John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 13, at 127.

46. Lisa Sanbonmatsu et al., *New Kids on the Block: Results from the Moving to Opportunity Experiment*, EDUC. NEXT, Fall 2007, at G1, G2 available at [http://media.hoover.org/documents/ednext\\_20074\\_60.pdf](http://media.hoover.org/documents/ednext_20074_60.pdf); *see also* Stefanie DeLuca, *All Over the Map: Explaining Educational Outcomes of the Moving to Opportunity Program*, EDUC. NEXT, Fall 2007, at 29, 29 available at [http://media.org/documents/edunext\\_20074\\_28.pdf](http://media.org/documents/edunext_20074_28.pdf).

47. Press Release, Hoover Inst., Relocating Poor Families to More-Affluent Neighborhoods Doesn’t Necessarily Lead to Improved Student Achievement (Aug. 14, 2007), <http://www.hoover.org/publications/ednext/9126936.html>.

48. *See Gautreaux v. Pierce*, 690 F.2d 616, 622-24, 638 (7th Cir. 1982) (affirming the lower court’s approval of the settlement); James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 13, at 150, 156; Inst. for Policy Research, Nw. Univ., IPR Research on *Gautreaux* and Other Housing Mobility Programs, <http://www.northwestern.edu/ipro/publications/Gautreaux.html> (last visited Apr. 9, 2008); *see also* James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility Programs*, 41 IND. L. REV. 653, 659-62 (2008).

49. *See Gautreaux*, 690 F.2d at 619.

50. *See id.* at 622-24.

51. Notice of Funding Availability (NOFA) and Program Guidelines for the Moving to Opportunity for Fair Housing Demonstration for Fiscal Year 1993, 58 Fed. Reg. 43,458, 43,458-59 (Aug. 16, 1993) (generally describing the demonstration’s design).

52. *See Xavier De Souza Briggs, Introduction*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra*

picture of the impact on the families, particularly the children, who made a mobility move.<sup>53</sup> That research, by James Rosenbaum and others, followed families over a much longer period than the MTO experiment and focused on a number of quality of life conditions that improved for movers, including education.<sup>54</sup>

The rush to declare housing mobility a “failed social policy” based on the limited results from the MTO program, particularly as it relates to providing a remedy to racial segregation, reflects less a policy concern that housing mobility will not succeed than a political concern that it will. There are already indications that such policies might find support in the next national administration. As part of his progressive message during his 2008 campaign, presidential candidate John Edwards spoke specifically of the need to use housing vouchers to allow families to live in housing outside of minority concentrated, high poverty areas.<sup>55</sup> While the top two contenders<sup>56</sup> have not made low-income housing a part of their stump speech, if there is a new Democratic administration it is likely that the idea of housing mobility will continue to find its way into anti-poverty and civil rights policy discussions for the reason so eloquently articulated by Senator Edwards and others.<sup>57</sup> Indeed, Alex Polikoff, the indefatigable father of *Gautreaux*, has already developed a policy proposal for the next administration to consider that would create a *Gautreaux*-style housing mobility program on a national scale.<sup>58</sup> No doubt the naysayers will continue their efforts to dismiss and discredit efforts to give low income minority families an escape route out of the ghetto; however, conductors on the modern day “Underground Railroad” like Polikoff can be expected to press for such policies as one of the most effective ways to provide relief to individual families who want access to the greater opportunities that exist beyond the borders of the ghetto.

It remains to be seen how best to respond to the challenges these developments present. Advocates and others in the progressive community who find abandoning the goal of an open inclusive society unacceptable and

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note 13, at 1, 13 (“[T]he lack of attention to persistently high segregation is dangerous in at least two respects. First, it ignores the huge contribution that segregated living makes to inequality in education, employment, health, and other areas.”).

53. See Rosenbaum et al., *supra* note 48, at 150, 157-58.

54. *Id.*

55. David Brooks, Op-Ed, *Edwards, Obama and the Poor*, N.Y. TIMES, July 31, 2007, at A19; Alec MacGillis, *On Poverty, Edwards Faces Old Hurdles: Critics Say He Brings Few Fresh Ideas to Signature Issue*, WASH. POST, May 7, 2007, at A01.

56. Senators Hillary Clinton and Barack Obama were the remaining two democratic contenders at the time of writing.

57. See sources cited *supra* note 55 and accompanying text.

58. Alex Polikoff, *A Vision for the Future: Bringing Gautreaux to Scale*, in *KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM* 137, 141-50 (Phillip Tegeler et al. eds., 2005), available at <http://www.prac.org/pdf/KeepingPromise.pdf>.

unsupportable need to be more engaged and aggressive in stating that position. Advocates who recognize that conditions in low-income communities are often vestiges of segregation should insist that the nation not move on until it effectively addresses that legacy. It is especially important that advocates from the fair housing and community development movements overcome their longstanding divide in order to ensure that a new strain of an old disease does not take hold in our body politic.

#### IV. THE BATTLEGROUND: LOW-INCOME HOUSING

The tensions between fair housing/civil rights and community development often play themselves out in the realm of low-income housing policy. Despite barriers that have been removed to housing choice and opportunity for more affluent people of color over the past forty years, low-income families of color continue to be dependent upon public policy decisions about where they can live. In recent years these tensions and conflicts have surfaced in the policy discussions and advocacy work surrounding public housing and the low-income housing tax credit program, as well as in the context of zoning and other local land use policies.

The public housing program, which began in 1937,<sup>59</sup> was expanded and institutionalized in 1949.<sup>60</sup> The program continues to provide affordable housing to very low-income people in communities throughout the country.<sup>61</sup> Public housing's current incarnation is most visible in the HOPE VI program that provides funds for the transformation of public housing using a mixed income housing model.<sup>62</sup>

The Low Income Housing Tax Credit program (LIHTC) was first authorized by Congress in 1987 and has financed approximately 1.5 million units of affordable housing nationwide,<sup>63</sup> using a tax incentive-based, private development and management approach.<sup>64</sup> Both are housing programs, but have increasingly come to be viewed as instruments of community development. Both have also perpetuated, rather than ameliorated, existing housing and community segregation, despite the mandates of the Fair Housing Act that federal housing

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59. See United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437-1437bbb-9 (2000)); *see also* U.S. Dep't of Hous. and Urban Dev., HUD Historical Background, <http://www.hud.gov/offices/adm/about/admguide/history.cfm> (last visited Apr. 9, 2008).

60. See Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 12 U.S.C. § 1701h (2000) and in scattered sections of 42 U.S.C.).

61. *See id.*

62. Homeownership and Opportunity for People Everywhere Program (HOPE VI Program), 42 U.S.C.A. § 1437v (West 2003 & Supp. 2007).

63. HUD User, HUD Data Sets, Low Income Housing Tax Credits, <http://www.huduser.org/datasets/lihtc.htm> (last visited July 10, 2008).

64. See Tax Reform Act of 1986, § 252(a), 26 U.S.C.A. § 42 (West Supp. 2007).

and community development programs “affirmatively further fair housing.”<sup>65</sup>

### A. *Public Housing/HOPE VI*

The role of federal housing policy in creating a public housing system that is both separate and unequal has been the subject of extensive litigation and academic and political commentary.<sup>66</sup> However, effective remedies for those conditions continue to evade both advocates and public policy makers.

During the Clinton Administration, efforts were made to affirmatively further fair housing when resolving civil rights litigation against federal and local housing agencies, albeit with limited success.<sup>67</sup> These initiatives sought to transform the ghetto conditions in public housing communities, expand housing opportunities by deconcentrating the location of public housing, and create more choices through the administration of the voucher program.<sup>68</sup> Civil rights advocates successfully litigated and argued that continuation of the status quo with regard to low-income housing policy perpetuated prior official segregation and was not only bad policy, but also unconstitutional.<sup>69</sup> Remedies negotiated by the plaintiffs and HUD focused on increasing housing choices and addressing the large public housing projects that were built to segregate and had deteriorated to the point that they blighted communities and destroyed lives.<sup>70</sup>

The litigation settlements evolved alongside the policy imperative of expansion of the voucher program and public housing transformation, most visibly in the implementation of the HOPE VI Program.<sup>71</sup> The story of HOPE VI is a story of improved housing opportunities and revitalized communities, but it is also a story of broken promises, missed opportunities, outright failures, and bad faith.<sup>72</sup> Rather than using the HOPE VI program to remedy the harmful

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65. See Exec. Order No. 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994); see also 42 U.S.C. § 3608 (2000).

66. See Florence Wagman Roisman, *Keeping The Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 How. L.J. 913, 913-16 (2005).

67. See Elizabeth Julian, “Deconcentration” as Policy: *HUD and Housing Policy in the 1990s*, in THE NIMBY REPORT, DECONSTRUCTING “DECONCENTRATION” 5, 6-8 (Mar. 2004).

68. *Id.*

69. See generally Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 336-46 (2007) (detailing the history of public housing desegregation litigation).

70. *Id.*

71. Julian, *supra* note 26.

72. HOPE VI has been criticized by many low-income housing advocates for many reasons. Some object to any demolition of public housing for any reason. Some object to demolition with one-for-one replacement of the low-income housing inventory given the great need for affordable housing for very low-income families. Others object to the failure to insure that all families displaced by redevelopment have either an opportunity to return or housing in as good a condition or location elsewhere. Civil rights advocates have criticized HUD for failing to use the demolition

legacy of segregation that public housing represented, the program became the vehicle by which many local communities and developers sought to implement a revitalization strategy without sufficient regard to what happened to the people who were displaced. In other communities, the HOPE VI process was used to continue the containment of low-income minority families in segregated conditions by rebuilding as much housing as possible on sites in blighted communities. Despite an undisputed need for such housing, policymakers refused to insure that all housing units being demolished for "revitalization" purposes were replaced, opting instead for a strategy that both reduced the low-income housing inventory and perpetuated segregation.<sup>73</sup>

As a democratically controlled Congress moves to re-authorize the HOPE VI program, advocates for low-income families have sought to make it a more fair and effective tool for improving lives and communities.<sup>74</sup> In the course of that involvement, the tension and even overt conflict between fair housing/civil rights advocates and some community based advocates has been brought to the fore.<sup>75</sup> The activists involved all consider themselves part of a progressive tradition that values and supports social justice for low-income people and the communities in which they live. All strongly support one-for-one replacement of any public housing that is demolished and protecting the rights of those currently living in public housing to return to the redeveloped community if they so choose.<sup>76</sup> However, some advocates maintain that HOPE VI is first and foremost a community building program and that any replacement housing must be located back on the original site or in the surrounding neighborhoods, regardless of the history of segregation in the affected community or the desires of those who wish

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and replacement opportunities provided by a HOPE VI grant to expand housing opportunities for low-income minority families throughout the community, instead using public housing to continue the segregation and containment of low-income minority families in low-income minority communities.

73. The Author was an official at HUD during the mid-1990s when HOPE VI was being implemented. While there were many well meaning and conscientious people who believed they were doing what was best under the circumstances, many of the criticisms are valid, though the issues varied by location. The Chicago experience, which has been the subject of much study, underscores particularly the challenges faced in the HOPE VI context. *See generally* Susan J. Popkin & Mary K. Cunningham, *Beyond the Projects: Lessons from Public Housing Transformation in Chicago*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 13, at 176-94.

74. *See* Letter from William P. Wilson, Dir. of Hous. Litig., Hous. Justice Network, to Dominique McCoy, Counsel, House Comm. on Fin. Servs. (Sept. 18, 2007) (on file with author).

75. The Author has been a participant in these discussions, some of the substance of which is reflected in letters exchanged between the different participants, all of which have been made public.

76. *See* Letter from Philip Tegeler, Executive Dir., Poverty & Race Research Action Council et. al., to the Honorable Barney Frank, Chair, House Fin. Servs. Comm., and the Honorable Maxine Waters, Chair, House Subcomm. on Hous. and Cmtys. Opportunity (Oct. 19, 2007) (on file with author).

to move.<sup>77</sup> They oppose policies that would create greater housing choice for low-income families outside of locations where public housing was originally built.<sup>78</sup>

While committed to protecting the rights of those who currently live in public housing, fair housing/civil rights advocates support an approach that respects both the interests of those currently living in the affected developments who wish to stay and/or return, as well as those who would make other choices, today and in the future.<sup>79</sup> This position is set out in a Statement of Principles that the advocates argue should guide public policy in the context not only of HOPE VI, but of all demolition and replacement.<sup>80</sup> The bill passed by the House does not directly address the issue of segregation, but efforts will continue as the Senate considers HOPE VI reauthorization over the next year.<sup>81</sup>

While an in-depth discussion of New Orleans public housing debate following the Katrina disaster is beyond the scope of this Article, that situation highlights the need to realize a more equitable, expansive vision for the future of low-income housing. Stacy Seicshnaydre, founder of the Greater New Orleans Fair Housing Center and professor at the Tulane University School of Law, has written a compelling piece, entitled *The More Things Change, the More They Stay the Same: In Search of a Just Public Housing Policy Post-Katrina*.<sup>82</sup> In the article, Seicshnaydre pleads with those who are truly concerned about the future of New Orleans public housing and its residents, past and future, to embrace a more just and more demanding vision for low-income housing in the New Orleans region.<sup>83</sup> The fundamental issue in New Orleans today, and in the public housing debate in general, is whether segregation is a problem that must or even should be addressed at the national level. Before the passage of the 1949 Housing Act, the argument made against addressing segregation was one of

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77. See Letter from Elizabeth K. Julian, President, Inclusive Cmtys. Project et al., to Sam Finkelstein, Nat'l Hous. Organizer, Nat'l Training and Info. Ctr. (Oct. 11, 2007) (on file with author); Letter from Inez Killingsworth, Co-Chair, Nat'l People's Action, to Elizabeth Julian, President, Inclusive Cmtys. Project et al. (Nov. 8, 2007) (on file with author).

78. See sources cited *supra* note 77.

79. Letter from Elizabeth K. Julian, President, Inclusive Cmtys. Project et al., to Inez Killingsworth, Co-Chair, Nat'l People's Action et al. (Nov. 21, 2007) (on file with author).

80. Press Release, Poverty & Race Research Action Council et al., Statement of Fair Housing and Civil Rights Advocates on HOPE VI Reauthorization (Dec. 2007), <http://lsnc.net/equity/ImgUpload/StatementPrinciples.pdf>.

81. The House passed H.R. 3524 on January 16, 2008, without reference to the need to address segregation in public housing beyond vague references to "affirmatively further fair housing" which can be expected to be as effective in undoing the vestiges of public housing segregation in the future as that reference in the Fair Housing Act has been for the past forty years. HOPE VI Improvement and Reauthorization Act of 2007, H.R. 3542, 110th Cong. (2007).

82. Stacy E. Seicshnaydre, *The More Things Change, the More They Stay the Same: In Search of a Just Public Housing Policy Post-Katrina*, POVERTY & RACE, Sept.-Oct. 2007, at 3.

83. See *id.* at 5-6.

postponement—get the housing now, and we can integrate it later.<sup>84</sup> Today, that argument is being supplanted by the contention that concerns about segregation are out of date and that the value of integration and diversity in contemporary American culture is open to serious question. This is an opportunity for civil rights/fair housing advocates and community development/low-income housing advocates to find common ground and support policies that do not repeat the mistakes of the past, but rather address them with a new vision and vigor.

### *B. Low Income Housing Tax Credit Program*

The Low Income Housing Tax Credit Program (“LIHTC program”) is the leading source of new housing units for low-income families.<sup>85</sup> It is also the most recent example of the federal government’s failure to incorporate fair housing principles in the administration of a low-income housing program.<sup>86</sup> The LIHTC program was initiated long after the passage of the Fair Housing Act and in full light of the growing awareness of the role that federal housing policy played in creating and exacerbating housing segregation for low-income families.<sup>87</sup> Despite that knowledge, there has been virtually no effort to ensure that the LIHTC program does not continue to perpetuate segregation, and criticism of the program on those grounds has been growing over the past fifteen years.<sup>88</sup> While the tax credit agencies are not required to maintain civil rights related data regarding the developments, available information suggests that in many places the LIHTC program is continuing the pattern of concentrating developments in high poverty, predominately minority areas or failing to ensure that units built in non-minority areas are available to low-income minority families.<sup>89</sup> For those familiar with the history of public housing, it is a new version of an old story.

As finally happened with public housing, litigation has begun to challenge the administration of the LIHTC program for perpetuation of segregation and failure to affirmatively further fair housing as required by the Fair Housing Act. In New Jersey, fair housing advocates challenged the State’s Qualified Allocation Plan<sup>90</sup> for failing to affirmatively further fair housing by concentrating

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84. Julian & Daniel, *supra* note 22, at 668-69.

85. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 n.1 (1998) (citing U.S. Gen. Accounting Office, *Tax Credits: Opportunities to Improve Oversight of the Low Income Housing Program* Sec. 2 (Mar. 1997)); *see also* LANCE FREEMAN, *SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990s*, at 2 (2004), available at [http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy\\_freeman/20040405\\_Freeman.pdf](http://www.brookings.edu/~media/Files/rc/reports/2004/04metropolitanpolicy_freeman/20040405_Freeman.pdf).

86. *See* Roisman, *supra* note 85, at 1012-13.

87. *See id.*

88. *See id.*

89. *See id.* at 1012-13, 1019-22.

90. *See* 26 U.S.C.A. § 42(m)(1)(B) (West Supp. 2007) (explaining that the Qualified Allocation Plan is the annual plan adopted by individual state housing finance agencies that set out

tax credit units in the predominantly minority urban areas, thereby perpetuating the historic residential segregation.<sup>91</sup> Community based organizations and others active on low-income housing issues (such as the Local Initiatives Support Corporation, known as LISC) came to the State's defense. They argued that tax credits should be used as tools of community development and given to inner city non-profits rather than to developers who would produce units for occupancy in the whiter, more affluent, and higher opportunity suburbs.<sup>92</sup> The New Jersey Superior Court struck down the challenge, deferring to the state housing finance agency's determination about how to allocate credits in a way that "affirmatively further[s]" fair housing.<sup>93</sup> To date, a federal court has not spoken on the issue of the LIHTC program's obligations under the Fair Housing Act, but there is every indication that further litigation is planned which will remedy that lack of perspective. Recognizing that it is now the primary vehicle for the production of affordable housing units, national and local civil rights advocates have turned their attention to the LIHTC program, after years of urging by a few visionary scholar/advocates who understand the implications of this important program for addressing the difficult problem of segregation.

The debate continues about the responsibilities of the public housing and LIHTC programs under the Fair Housing Act and other civil rights laws. This debate provides an important opportunity for fair housing, civil rights, low-income housing, and community development advocates to develop a unified agenda to provide housing in higher opportunity areas as well as in areas where the provision of such resources will further the revitalization of a community and prevent unwelcome displacement. This sort of balance was urged upon the court by the Institute for Social Justice in New Jersey in its very persuasive amicus brief before the New Jersey Supreme Court.<sup>94</sup> Such an approach would build upon the work of those who, in many ways, should be natural allies in pursuing racial justice and equal opportunity in low-income housing. The policies must acknowledge the role that race has played in the challenges faced by low-income people of color and the communities in which they live. They must not assume that the people affected are monolithic in the choices they will make or the paths that they wish to take, today or for the next generation. Those who consider themselves part of the fair housing, low-income housing, and community development movements should come together on this pivotal issue to stand up

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the terms by which the tax credits will be allocated in that state for the coming year).

91. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 9-10 (N.J. Super. Ct. App. Div. 2004).

92. Amicus Curiae, Brief on Behalf of Local Initiatives Support Corporation at 1-3, *In re* Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (No. A-10-02T2) (on file with author).

93. *In re* Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d at 27.

94. Brief in Support of Motion to Appear as Amici Curiae and on the Merits at 1-3, *In re* Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d 1 (No. A-10-02T2) (on file with author).

for the rights of low-income people of color in hope of providing them real and effective choices about where they live, who they live with, and the opportunities that those choices bring.

## V. COMING TOGETHER

Why, one might ask, should we? In a world of limited resources, every dollar spent to open an exclusive white suburb is one less dollar spent to improve or protect an existing minority neighborhood or community and vice versa. It is true that resources dedicated to addressing the evils of racism and poverty are, of course, particularly scarce. However, during the past forty years the divided fair housing and community development movements have not succeeded in either dismantling the vestiges of segregation in communities of color or in creating an open and inclusive society. These movements have just causes that are best advanced together.<sup>95</sup> If the deal is implicitly made that addressing the vestiges of segregation in minority neighborhoods will keep people of color out of white neighborhoods, it is a deal that should fail. If the deal is implicitly made that making resources available for housing mobility and choice can excuse the neglect of minority communities, or permit gentrification and “disperse” people regardless of their wishes, it is a deal that should fail. Finally, if the deal is that “we’ll take the east side and you can take the west side,” such racial partitioning of our nation’s people and geography is inconsistent with our highest ideals and most concrete promises, and it should fail.

As the above discussion suggests, one of the most effective replacements for old de jure segregationist strictures has been local land use policy in the form of zoning ordinances and similar municipal laws.<sup>96</sup> While neutral on their face, they are as effective, and perhaps even more effective than their predecessor laws, in effectuating racial exclusion, racial containment, and racial oppression.<sup>97</sup> Some

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95. MARCANTONIO, *supra* note 22, at 307-08.

Housing and civil rights are an integral part of each other. Housing is advanced in the interest of the general welfare and in the interest of strengthening democracy. When you separate civil rights from housing you weaken that general welfare. You weaken that democracy that you pretend to strengthen. . . . [The] attempt to separate civil rights from housing is dishonest political opportunism.

*Id.* (“Congressman Marcantonio argued [on June 29, 1949] in support of his amendment to a bill providing [f]ederal funds for housing. The amendment prohibited the use of such funds to all projects which permitted segregation or any other form of discrimination.”). This point was made forty years ago and is still true today.

96. Kushner, *supra* note 41, at 602 (noting that “traditional urban planning and land regulation have rendered the nation more segregated by race, ethnicity, and class”); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 92-95 (2001); David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1141-71 (2008).

97. See generally Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1988); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights;

communities may forbid multifamily development altogether, or use density standards or design requirements to price affordable development out of the municipality. Other communities use zoning and land use policies to continue the placement of undesirable uses, such as landfills and other environmental hazards, in low-income minority communities, while protecting predominately white communities from such impacts, or to ensure that the housing stock in minority communities is kept modest, while allowing growing white communities to use lot size and other policies to ensure that their tax base grows, and their population is affluent. Place-based community development corporations generally do not challenge these local laws because the policies either exist in places where community development corporations do not operate and will not go, or the cost of legal challenges, both financial and political, is beyond their capacity. Fair housing organizations also leave these conditions unchallenged because the policies involve systemic structures of racial exclusion and are not about individual acts of discrimination. As a consequence, neither movement is currently positioned to make real change. That can be overcome, but it will require that the community development and fair housing movements, along with their more muscled affordable housing and civil rights advocates at the national level, come together to forge a common agenda to address these challenges.<sup>98</sup>

Such an agenda must be based upon the belief that people who live in this country have the right to live where they choose and to access opportunity wherever it can be found, unlimited by *de jure* or *de facto* assumptions about race. We must invest in the difficult task of creating inclusive communities of opportunity, and truly take seriously the Fair Housing Act mandate to “affirmatively further fair housing” in every aspect of our housing and community development work. Many might suggest that the urgency surrounding the continued devastating impact of poverty, environmental degradation, and the very real affordable housing crisis may have made the issue of segregation seem too controversial to take on and that “fair housing” is a baggage that those issues cannot afford to carry; however, these conceptions are wrong. Housing is more than shelter and there is a racial dimension at work in all those areas. Housing can be an instrument of social containment and oppression or a means to access opportunity, security, and wealth. While poverty afflicts people of all races, the debilitating effects of concentrated poverty are not visited upon poor whites to the same degree as upon low income people of color, and the communities in which poor whites live are not marred by the same sort of indicators of “distress” as those in which poor people of color reside.<sup>99</sup>

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558 F.2d 1283 (7th Cir. 1977); *Miller. v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002).

98. Exciting work in this regard is being done by Policy Link, a California-based organization which promotes what it calls the “equitable development movement”—a movement “anchored by the fair distribution of affordable and racially inclusionary housing.” *See* Angela Glover Blackwell & Judith Bell, *Equitable Development for a Stronger Nation: Lessons from the Field*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 13, at 289, 289.

99. DIANE L. HOUK ET AL., INCREASING ACCESS TO LOW-POVERTY AREAS BY CREATING

However, even if one believes that “separate” can be “equal” and is a more desirable social organizing principle, opportunities in our nation still depend greatly on where one lives, and where one lives depends greatly on one’s race. Fair housers should join community development practitioners in making the unequal conditions and mistreatment of minority communities a civil rights issue, and demanding a remedy in the statehouse and the courthouse. People of color, particularly those who find themselves at the intersection of race and poverty, should be able to access the opportunities that already exist in more racially diverse or white communities and should be supported in that choice. Failure to help low-income people of color in asserting that right does not strengthen the community development movement and indeed will only perpetuate the injustice it seeks to overcome.

### CONCLUSION

America is growing more diverse by the day. Individuals cannot be forced to stay in or return to their respective racial enclaves in order to capture the range of social and financial capital that such an arrangement might provide, however attractive that might seem from a community development perspective. In spite of all odds, and for many reasons, people will continue to choose to live outside their racial and economic comfort zone if provided the opportunity. Those choices must be supported, and we must build a theory of community that values those choices.

The legal and moral imperative of fair housing is real and can be put to effective use as part of a combined fair and affordable housing and equitable community development agenda. Fair housing, affordable housing, and community development activists can continue to fight over the small pie that is currently available to feed our hunger for racial and social justice, or they can come together to demand a bigger pie that can be distributed more equitably. The current political environment should be receptive to the agenda of social justice advocates able to find common ground on the issues of fair housing and community development that will finally erase the vestiges of segregation. For that reason, fair housing/civil rights and community development/affordable housing advocates should come together and begin to build their respective movements anew on a foundation that respects and supports the other’s core values. They must understand their dual histories, including where goals have diverged and why, and how they can become stronger by coming together around an agenda that deals honestly but optimistically with the issue of race.

As advocates seek to preserve old communities or build new ones, they should commit themselves to the principle that those communities must be inclusive, and find ways to make such a proposition less threatening. These ultimately are not legal challenges, though legal tools will continue to be useful. They are personal and group challenges to our own identities and call upon our

individual and collective sense of responsibility and possibility. A community development movement that embraces fair housing as a meaningful component of its mission will be a more powerful and effective movement going forward. A fair housing movement that recovers its birthright, and moves from the fringes to the forefront of the battle for a truly open society of equal opportunity, will be more powerful and relevant going forward. These social justice movements can unite around a commitment to equal opportunity for all, created through access to safe neighborhoods, affordable housing, good schools, jobs, and a healthy environment in open, equitably developed, and inclusive communities. It is a vision and a goal worthy of our future.

# URBAN NEIGHBORHOOD REGENERATION AND THE PHASES OF COMMUNITY EVOLUTION AFTER WORLD WAR II IN THE UNITED STATES

JAMES A. KUSHNER\*

## ABSTRACT

This Article describes four distinct phases that urban neighborhoods have passed through in the last sixty years. The first phase, from World War II until 1968, followed a pattern of decentralization, investment in suburban infrastructure, and strict segregation. The second phase, 1968 to 1975 was marked by hyper-sprawl, the loss of the central city economic base and population, and hyper-segregation. The third phase, 1975 to 1990, was characterized by class segregation, increased cost to access the suburbs, and increased class and racial separation. The fourth phase, 1990 to 2008, witnessed hyper-segregation; voluntary class, racial, and ethnic separation; and persistent racial discrimination. The Article suggests that the United States may be entering a fifth post-war phase of Smart Growth, public transport, infill strategies, and New Urbanist and suburbanist designs producing greater diversity.

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## INTRODUCTION

America's urban centers have evolved through four distinct phases in the last fifty years. The first phase, from World War II until 1968, followed a pattern of decentralization and was marked by extraordinary investment in suburban infrastructure including federally subsidized highways, utility extension, and rapid suburbanization. During this period, development was strictly segregated

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on the basis of race. The principal regulatory model was zoning, particularly suburban exclusionary zoning requiring detached, single-family homes on relatively large lots. This phase concluded with passage of the Federal Fair Housing Act known as Title VIII.<sup>1</sup>

The second phase, 1968 to 1975, was marked by hyper-sprawl. During this period, cities lost jobs as manufacturing shifted to the sun belt, the suburban belt, or went offshore. The city became more unattractive and lost its tax base because retail and businesses moved to the suburbs. Public services in the city declined as suburban services improved with the support of an enhanced tax base. As public schools were faced with broad desegregation remedies, whites left the city causing the further decline of the structure and tax base of the city. Finally, subdivision regulation resulted in expensive suburbs based upon a model of attractive, single-family, automobile-based lifestyles.

The third phase, 1975 to 1990, was characterized by class segregation. As suburbs increased access costs through regulation, inflated demand-push land prices, exclusionary zoning and growth management, the suburbs and city became distinguished from one another by class. The poor were concentrated in the city and the affluent in the suburbs.

The fourth phase, 1990 to 2008, can be described as hyper-segregation. This period was marked by an increase in voluntary class, racial, and ethnic separation as more ethnic and racially concentrated neighborhoods grew or were established. Although residential segregation in the United States is largely the result of both government and private discrimination, voluntary segregation by whites marked the geography between 1945 and 1975, and since that time, voluntary separation has been a phenomenon of both whites and non-whites with a relatively small number of non-whites choosing assimilation and residential integration for which there exists limited opportunities. Even where integration occurs according to census data, however, minorities frequently concentrate in small suburban or urban enclaves masking the extent of separation and the lack of social cohesion. Neighborhoods were increasingly regenerated through gentrification and the investment of public and private funds. The divide between many minority communities (now in the city and the older suburbs) and the more affluent, predominantly white and newer suburbs became more pronounced.

The United States may be entering a fifth post-World War II phase. This phase would be one of actual Smart Growth. Truly Smart Growth involves migrating away from automobile-based transport to a greater use of public transport and developing transit-served urban and suburban communities that incorporate infill strategies, are denser, and utilize New Urbanist designs. The results will be the creation of pedestrian-friendly models of the European compact city and a recreation of pre-war, small, industrial towns and streetcar neighborhoods and suburbs. The increase in density, accessibility, and choice between homes of different sizes and costs may stimulate greater racial and ethnic diversity and assimilation. The four post-World War II phases of urban

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1. 42 U.S.C. §§ 3601-3619, 3631 (2000).

evolution:

PHASES	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth

### I. PHASE ONE—DECENTRALIZATION: 1945-1968

Phase	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning

At the end of World War II, pent-up housing demand and returning soldiers sent the public looking for new housing in the newly developing suburbs. The period between 1945 and 1968 was marked by extraordinary national investment in suburban infrastructure including federally subsidized highways,<sup>2</sup> utility extension,<sup>3</sup> and rapid suburbanization.<sup>4</sup> Suburbanization resulted from demand

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2. See generally 23 U.S.C. §§ 101-189 (2000); JAMES A. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES 21-24 (1980) [hereinafter KUSHNER, APARTHEID IN AMERICA] (originally published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 568-71 (1979)); JAMES A. KUSHNER, THE POST-AUTOMOBILE CITY: LEGAL MECHANISMS TO ESTABLISH THE PEDESTRIAN-FRIENDLY CITY 11-14 (2004) [hereinafter KUSHNER, THE POST-AUTOMOBILE CITY]; James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981) [hereinafter Kushner, *Urban Transportation Planning*]; Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406 (1976).

3. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30.

4. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 231-45 (1985).

fueled by the availability of low-interest loans for the purchase of modestly priced houses in new suburban subdivisions. Loans were insured by the Federal Housing Administration<sup>5</sup> and often made through the Veterans Administration.<sup>6</sup> During this period, development was strictly segregated on the basis of race as mandated by federal government loan requirements, i.e., the federal government conditioned the availability of mortgage insurance to entire housing developments on the adoption of racial covenants or equitable servitudes<sup>7</sup>—covenants inserted into subdivision deeds or in the subdivision plat filed with the deed and binding future lot purchasers as compared to covenants entered into between neighbors or those attached to deeds—and often local zoning,<sup>8</sup> private covenants,<sup>9</sup> or simply violence by local police or white supremacists.<sup>10</sup> The basis of the requirement was the belief that a one-race community would stabilize housing values and assure marketability by adhering to the American custom of racial segregation.<sup>11</sup> The principal regulatory mechanism used was zoning,<sup>12</sup> particularly suburban exclusionary zoning

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5. National Housing Act, 12 U.S.C. §§ 1701-1750 (2000); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30.

6. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 12 & 38 U.S.C.); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30.

7. See *FHA UNDERWRITING MANUAL* ¶ 935 (1938) (containing model mandatory racial restrictive covenant); JACKSON, *supra* note 4, at 203-18; KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30; JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 129-30 (2005); John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 *LAW & SOC. INQUIRY* 399, 411 (2007) (describing proactive FHA segregationist policy).

8. See *City of Richmond v. Deans*, 281 U.S. 704, 713 (1930); *Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (permitting Negro residence only upon consent of majority of neighborhood); *Buchanan v. Warley*, 245 U.S. 60, 80-92 (1917) (invalidating the practice as interfering with the white seller's freedom of contract); JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 276-79 (1959); KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 15-16.

9. Compare *Corrigan v. Buckley*, 271 U.S. 323, 331-32 (1926) (sustaining racial covenants as part of freedom of contract and disposal of property), with *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948) (invalidating judicial enforcement of private racial covenants as illegal state action). See generally KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 16-20.

10. See LOEWEN, *supra* note 7, at 227-79.

11. See KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 20-30; see also IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* 115-41 (2005); Kimble, *supra* note 7, at 20-30 (describing proactive FHA segregationist policy); Rajeev D. Majumdar, Comment, *Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners*, 30 *SEATTLE U. L. REV.* 1095, 1102 (2007).

12. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 379-80 (1926); see also Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 *HARV. L. REV.* 1154, 1154 (1955); Joel S. Hirschhorn, *Zoning Should Promote Public Health*, 18 *AM. J. HEALTH PROMOTION* 258,

requiring detached, single-family homes on relatively large lots.<sup>13</sup> Communities often required in excess of an acre per home<sup>14</sup> with broad street setbacks for lawns.<sup>15</sup> Virtually no lots were zoned for mobile homes<sup>16</sup> or apartments.<sup>17</sup> Where apartments were provided, sites were often unattractive, and bedrooms were limited to exclude families and attract senior citizens and single adults.<sup>18</sup> The period ended with the dawn of the War on Poverty,<sup>19</sup> the Great Society,<sup>20</sup> and passage of the Federal Fair Housing Act, known as Title VIII,<sup>21</sup> which reflected the policies of President Lyndon Johnson.

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258-59 (2004).

13. *See Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 600 (Pa. 1965). For discussion of “Not in my Backyard” (“NIMBY”), see Vicki Been, *Comment on Professor Jerry Frug's the Geography of Community*, 48 STAN. L. REV. 1109, 1110-1134 (1996). *See generally* AM. BAR ASS'N, NIMBY: A PRIMER FOR LAWYERS AND ADVOCATES (1999); FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES (Edwin S. Mills & Wallace E. Oates eds., 1975) [hereinafter FISCAL ZONING]; JANE ANNE MORRIS, NOT IN MY BACK YARD: THE HANDBOOK (1994); Andrew Auchincloss Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101, 137-42 (2004) (arguing conversion of local zoning to regional planning).

14. *See Nat'l Land & Inv. Co.*, 215 A.2d at 600.

15. *See Gorieb v. Fox*, 274 U.S. 603, 604-05 (1927) (sustained over taking claim); V. Woerner, Annotation, *Validity of Front Setback Provisions in Zoning Ordinance or Regulation*, 93 A.L.R. 2d 1223 (1964).

16. *Compare Vickers v. Twp. Cmty.*, 181 A.2d 129, 138 (N.J. 1962) (sustaining exclusion), *overruled by* S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983), *with* English v. Augusta Twp., 514 N.W.2d 172, 173 (Mich. Ct. App. 1994) (illegal exclusion) *and* S. Burlington County NAACP, 456 A.2d at 450-51 (obligation to include unless alternative means to house a fair share of regional affordable housing need).

17. *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 107 (Pa. 1977). *See generally* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); Bruce L. Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L. F. 1, 1; Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 790-94 (1969).

18. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 44-52.

19. *See generally* BILIANA C.S. AMBRECHT, POLITICIZING THE POOR: THE LEGACY OF THE WAR ON POVERTY IN A MEXICAN-AMERICAN COMMUNITY (1976); HUBERT H. HUMPHREY, WAR ON POVERTY (1964); MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); EDWARD ZIGLER & JEANETTE VALENTINE, PROJECT HEAD START: A LEGACY OF THE WAR ON POVERTY (1979).

20. *See generally* JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY (1998); NANCY A. COLBERT, GREAT SOCIETY: THE STORY OF LYNDON BAINES JOHNSON (2002); WILLIAM LOREN KATZ, A HISTORY OF MULTICULTURAL AMERICA: THE GREAT SOCIETY TO THE REAGAN ERA, 1964-1990 (1993); IRWIN UNGER, THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON (1996).

21. 42 U.S.C. §§ 3601-3619, 3631 (2000).

## II. PHASE TWO—HYPER-SPRAWL: 1968-1975

Phase	Social Equity	Subsidy	Regulation
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision

During the period from 1968 to 1975, urban and regional development was defined by hyper-sprawl.<sup>22</sup> Urban centers were developing circumferential highways<sup>23</sup> that circled the city on the edge of older suburbs generating an enormous supply of accessible land to build new housing subdivisions.<sup>24</sup> Along with interstate and state highways, the local highway systems provided the access for a stampede toward suburban development.<sup>25</sup> Also attracted were the big-box retailers,<sup>26</sup> the mega-malls,<sup>27</sup> and the new industrial and office centers that made

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22. Edward H. Zigler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L. 26, 28-33 (2003). See generally ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING AND ENVIRONMENTAL SYSTEMS (1999); WILLIAM FULTON ET AL., BROOKINGS INST., WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S. 2-3 (2001), available at <http://www.brookings.edu/es/urban/publications/fulton.pdf>; Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 183-86 (1997); Michael Lewyn, *The Law of Sprawl: A Road Map*, 25 QUINNIPAC L. REV. 147, 164 (2006); Henry R. Richmond, *Sprawl and Its Enemies: Why the Enemies Are Losing*, 34 CONN. L. REV. 539, 553-54 (2002).

23. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 21-24; Kushner, *Urban Transportation Planning*, *supra* note 2, at 173; Gilbert Paul Verbit, *The Urban Transportation Problem*, 124 U. PA. L. REV. 368 (1975).

24. JACKSON, *supra* note 4, at 233; KUSHNER, THE POST-AUTOMOBILE CITY, *supra* note 2, at 11-14; Robert Fishman, *The American Metropolis at Century's End: Past and Future Influences*, 11 HOUSING POL'Y DEBATE 199, 200 (2000); James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 215 (1982); Kushner, *Urban Transportation Planning*, *supra* note 2, at 173; Zigler, *supra* note 22, at 35-36.

25. JACKSON, *supra* note 4, at 3-5; see also OLIVER GILLHAM: THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE 15-16, 32-38, 42-45, 134-36 (2002); Michael Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 304-35 (2000) [hereinafter Lewyn, *Suburban Sprawl*].

26. Richard Vedder, *Wal-Mart, Individuals and the State*, 39 CONN. L. REV. 1725, 1726, 1734 (2007) (noting that the average household in the United States spends \$2000 annually at Wal-Mart and that big-box retailers have increased the GDP by 5%).

27. Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533 (2004) (citing International Council of Shopping Centers, *Did You Know?*, <http://www.icsc.org/srch/about/DidYouKnow.pdf>

up the “edge cities”—some as far as twenty to fifty miles from the old city centers.<sup>28</sup> Farmland disappeared<sup>29</sup> as fast as sales of automobiles increased.<sup>30</sup> During this period, when cities lost jobs<sup>31</sup> because manufacturing shifted to the

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(last visited Apr. 15, 2008) (45,721 shopping centers in the United States account for over half of all retail sales)).

28. See generally JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991); ROBERT E. LANG & JENNIFER B. LEFURGY, *BOOMBURBS: THE RISE OF AMERICA'S ACCIDENTAL CITIES* 85-89 (2007).

29. U.S. DEP'T AGRIC., NATURAL RES. CONSERVATION SERV., *FARM AND RANCH LANDS PROTECTION PROGRAM FINAL ENVIRONMENTAL ASSESSMENT 1* (2003) (approximately four million acres of prime farmland will be lost to nonagricultural uses between 2002 and 2007, amounting to approximately 667,000 acres per year); Michael R. Eitel, *The Farm and Ranch Lands Protection Program: An Analysis of the Federal Policy on United States Farmland Loss*, 8 DRAKE J. AGRIC. L. 591, 593 (2003); Lawrence W. Libby & Michael R. Dicks, *Rural-Urban Interface Issues*, in *THE 2002 FARM BILL: POLICY OPTIONS AND CONSEQUENCES* (Joe L. Outlaw & Edward G. Smith eds., 2001), available at [http://www.farmfoundation.org/news/articlefiles/35-2002\\_farm\\_bill\\_policy.pdf](http://www.farmfoundation.org/news/articlefiles/35-2002_farm_bill_policy.pdf) (approximately 645,000 acres of the nation's most productive farmland will be converted to urban uses each year); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 113 (1998) (loss of 1.5 million acres of farmland per year in the United States) (citing AM. FARMLAND TRUST, MEMBERSHIP PAMPHLET, *SAVING THE LAND THAT FEEDS AMERICA* (1995)); Am. Farmland Trust, Issues & Programs, <http://www.farmland.org/programs/default.asp> (last visited Apr. 25, 2008) (each year nearly 1.2 million acres of American farmland will be lost to sprawling development).

30. JAMES J. MACKENZIE, *THE KEYS TO THE CAR: ELECTRIC AND HYDROGEN VEHICLES FOR THE 21ST CENTURY* 5 (1994) (between 1970 and 1990, U.S. automobile population grew almost three times faster than the human population); Hank Dittmar, *Sprawl: The Automobile and Affording the American Dream*, in *SUSTAINABLE PLANET: SOLUTIONS FOR THE TWENTY-FIRST CENTURY* 109, 109 (Juliet B. Schor & Betsy Taylor eds., 2002) (184,980,187 licensed drivers and 207,048,193 licensed motor vehicles in 1998); John Seabrook, *The Slow Lane: Can Anyone Solve the Problem of Traffic?*, *NEW YORKER*, Sept. 2, 2002 (since 1970, population of the United States has grown by 40%, while the number of motor vehicles has increased by 100% and road capacity has increased by 6%).

31. Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL'Y 513, 513-15 (1996) (citing *THE WORLD ALMANAC AND BOOK OF FACTS* 1996, at 381, 390, 425 (Robert Famighetti ed., 1995) [hereinafter 1996 ALMANAC] and *THE WORLD ALMANAC AND BOOK OF FACTS FOR 1954*, at 292, 294 (Harry Hansen ed., 1954) [hereinafter 1954 ALMANAC]) (between the 1950s and 1980s, eighteen of the nation's twenty-five largest cities suffered a population loss, and by contrast, during the same years, the population of the nation's independent suburbs gained more than sixty million persons, and in recent years businesses have also followed their employees to the suburbs causing cities to lose jobs as well as people). The following figures indicate the eighteen largest cities in America which suffered population losses between 1950 and 1990 (ranked from highest to lowest according to 1950 figures):

New York (from 7,891,957 in 1950 to 7,322,564 in 1990), Chicago (from 3,550,404 in 1950 to 2,783,726 in 1990), Philadelphia (from 2,071,605 in 1950 to 1,585,577 in 1990), Detroit (from 1,849,568 in 1950 to 1,027,974 in 1990), Baltimore (from 949,708

sun belt, the suburban belt, or went offshore, the city became more unattractive and lost its tax base<sup>32</sup> as retail and businesses moved to the suburbs.<sup>33</sup> Public services declined in the city as the enhanced suburban tax base generated improved suburban services.<sup>34</sup> As public schools were faced with broad

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in 1950 to 736,014 in 1990), Cleveland (from 914,808 in 1950 to 565,616 in 1990), St. Louis (from 856,796 in 1950 to 396,685 in 1990), Washington, D.C. (from 802,178 in 1950 to 606,900 in 1990), Boston (from 801,444 in 1950 to 574,283 in 1990), San Francisco (from 775,357 in 1950 to 723,959 in 1990), Pittsburgh (from 676,806 in 1950 to 369,879 in 1990), Milwaukee (from 637,392 in 1950 to 628,088 in 1990), Buffalo (from 580,132 in 1950 to 328,175 in 1990), New Orleans (from 570,445 in 1950 to 496,938 in 1990), Minneapolis (from 521,718 in 1950 to 368,383 in 1990), Cincinnati (from 503,998 in 1950 to 364,114 in 1990), Kansas City (from 456,622 in 1950 to 434,829 in 1990) and Newark (from 438,776 in 1950 to 275,221 in 1990).

*Id.* (citing 1996 ALMANAC). Of the cities which ranked among the twenty-five largest in 1950, only seven (Los Angeles, Houston, Seattle, Dallas, Denver, Indianapolis, and San Antonio) had a larger population in 1990 than in 1950. *Id.* For example, St. Louis's population nose-dived from 856,796 in 1950 to 396,685 in 1990, while during the same period suburban St. Louis County's population soared from 406,349 to 993,508. *Id.* (citing 1996 ALMANAC). Similarly, Washington, D.C.'s population declined from 802,178 in 1950 to 606,900 in 1990, while the population of suburban Montgomery County, Maryland increased from 164,401 to 757,027 during that period. *Id.* (citing 1996 ALMANAC and 1954 ALMANAC); *see* JACKSON, *supra* note 4, at 283; Clarence Lusane, *Persisting Disparities: Globalization and the Economic Status of African Americans*, 42 HOW. L.J. 431, 443 (1999) (observing "Chicago lost 79,744 manufacturing jobs during the 1980s directly due to plant closings and relocations and an additional 106,200 jobs in the city and surrounding areas as reverberations from those initial job losses. In the rest of the state, another 68,000 jobs were eliminated as firms relocated jobs to Mexico's Maquiladora industries which operate along the Mexican-Texas border.") (citing DAVID C. RANNEY & WILLIAM CECIL, CTR. FOR URBAN & ECON. DEV., *TRANSNATIONAL INVESTMENT AND JOB LOSS IN CHICAGO: IMPACTS ON WOMEN, AFRICAN AMERICANS, AND LATINOS* 2 (1993))).

32. William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-70 (1999); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 9-10 (2006); *see also* Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1723-24 (1979). *See generally* DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993).

33. F. KAID BENFIELD ET. AL., NATURAL RES. DEF. COUNCIL, *ONCE THERE WERE GREENFIELDS: HOW URBAN SPRawl IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY AND SOCIAL FABRIC* 14 (1999) (stating "around 95 percent of the 15 million new office jobs created in the 1980s were in low-density suburbs," and suburbs "captured 120 percent of net job growth in manufacturing"); Freilich & Peshoff, *supra* note 22, at 190-92; Lewyn, *Suburban Sprawl*, *supra* note 25, at 302 (stating that jobs as well as people have fled to suburbia); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 349 (1999); Anne Gearan, *Clinton to Help Needy Own Car*, ATLANTA J. CONST., Feb. 24, 2000, at C1 (stating two-thirds of all new jobs are created in suburbs).

34. KUSHNER, *APARTHEID IN AMERICA*, *supra* note 2, at 56-63; Emel Gökyigit Wadhani,

desegregation remedies, whites left the city causing the further decline of the structure and tax base of the city as well as limiting diversity.<sup>35</sup> Since property taxes were the predominant funding mechanism for schools, declining city values translated into a reduction of school funding.<sup>36</sup> Reduced funding, the problems of multiple languages, a student body containing too many unmotivated learners, and a marked decline in school quality and average test scores rendered the city schools and neighborhoods unattractive.<sup>37</sup> White flight included transfers to religious and private schools which further threatened the public schools.<sup>38</sup> It was also during this period that African Americans began a migration to the suburbs, albeit on a somewhat separate basis and not without white resistance.<sup>39</sup> Zoning<sup>40</sup> and subdivision<sup>41</sup> regulation were the dominant regulatory mechanisms,

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*Achieving Greater Inter-Local Equity in Financing Municipal Services: What We Can Learn from School Finance Litigation*, 7 TEX. F. ON C.L. & C.R. 91, 94 (2002).

35. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 74-84; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 642-43 (1983); Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 886 (1993); Wadhwani, *supra* note 34, at 95; Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1028-30 (1999).

36. James K. Gooch, *Fenced In: Why Sheff v. O'Neill Can't Save Connecticut's Inner City Students*, 22 QUINNIPAC L. REV. 395, 397 (2004); Mildred Wigfall Robinson, *Fulfilling Brown's Legacy: Bearing the Costs of Realizing Equality*, 44 WASHBURN L.J. 1, 11-12 (2004); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 259-60 (1999) (discussing ineffective financial reforms); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 (2002). Cf. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006) (arguing that the citizenship clause of the Fourteenth Amendment requires equality in educational resources between states which is a greater problem than disparity of resources between districts within states and arguing for an affirmative obligation of Congress to fund a minimum floor). Compare Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002) (describing extraordinarily poor-performing Cleveland schools) and San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-20 (1973) (sustaining property-tax financed school system resulting in significantly higher per pupil expenditures in suburbs as compared to cities), with Sheff v. O'Neill, 678 A.2d 1267, 1280 (Conn. 1996) (recognizing affirmative obligation to equalize educational opportunities between city and suburb).

37. Susan L. DeJarnatt, *The Myths of School Choice: Reflections on the Two-Income Trap*, 4 RUTGERS J.L. & PUB. POL'Y 94, 108-17 (2006); Susan L. DeJarnatt, *The Philadelphia Story: The Rhetoric of School Reform*, 72 UMKC L. REV. 949, 952 (2004); Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON. REV. 183, 183-85 (2006).

38. Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 770-71 (1993).

39. ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY* 209-54 (2004).

40. Been, *supra* note 13, at 1110-14; Annette B. Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981); Sager, *supra* note 17, at 767. See generally AM. BAR ASS'N, *supra* note 13, at 33-47; FISCAL ZONING, *supra* note 13, at 33-47; MORRIS, *supra* note 13, at 104-07; see also Lundgren,

resulting in the suburbs becoming expensive and following a strict model of attractive, single-family, automobile-based lifestyles. Avoidance of service-demanding, lower-income residents and use of expensive parking conditions and low density zoning discouraged or outlawed the development of suburban apartments. More expensive homes required infrastructure and amenities, and higher quality homebuilders dramatically increased the cost of a home.<sup>42</sup>

### III. PHASE THREE—CLASS SEGREGATION: 1975-1990

Phase	Social Equity	Subsidy	Regulation
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action

As the suburbs expanded in size and prestige, housing costs increased. Cost-generating regulation,<sup>43</sup> such as exclusionary zoning<sup>44</sup> and growth management,<sup>45</sup> and a steady demand that inflated land and home prices led to dramatic economic class segregation between city and suburb.<sup>46</sup> The poor became concentrated in

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*supra* note 13, at 104-07 (arguing conversion of local zoning to regional planning).

41. 1 JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 4:05 (2d ed. 2001 and Supp. 2007) [hereinafter KUSHNER, *SUBDIVISION LAW*] (discussing housing price inflation). *See generally* Michael M. Shultz & Jeffrey B. Groy, *The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action*, 1988 UTAH L. REV. 569; Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525 (1990).

42. NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 213-15 (1969); LYNNE B. SAGALYN & GEORGE STERNLIEB, CTR. FOR URBAN POLICY, *ZONING AND HOUSING COSTS: THE IMPACT OF LAND-USE CONTROLS ON HOUSING PRICE* 20-24 (1972).

43. *See generally* Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Working Paper No. 1948, 2002), available at <http://www.economics.harvard.edu/pub/hier/2002/HIER1948.pdf>.

44. *Been, supra* note 13, at 1110-14; *Sager, supra* note 17, at 767; *see also* Lundgren, *supra* note 13, at 101-03 (arguing conversion of local zoning to regional planning). *See generally* AM. BAR ASS'N, *supra* note 13, at 33-47; *FISCAL ZONING*, *supra* note 13, at 31-100; *MORRIS, supra* note 13, at 236-38.

45. KUSHNER, *SUBDIVISION LAW*, *supra* note 41, § 4:05 (discussing housing price inflation); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); *see generally* Lawrence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Control on Housing Prices*, 30 J.L. & ECON. 149 (1987).

46. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001) [hereinafter Cashin, *Middle-Class Black Suburbs*]; Paul A. Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AM. SOC. REV. 984, 990-91 (1996) (showing increase

the city and the affluent in the suburbs. Although minority racial and ethnic groups entered the suburban housing market as part of assimilation, class separation increased.<sup>47</sup> Neighborhoods became characterized by the average resident income. The most affluent resided in neighborhoods with the best amenities and facilities, such as clean air, access to recreation, and green spaces, or in urban neighborhoods such as the old city center or around university campuses and trendy communities where investment and gentrification displaced the poor. Most of the wealthy, however, settled in the affluent suburbs.<sup>48</sup> The poor and lower income workers largely resided in poor census tracts in the center city and depressed suburban communities.<sup>49</sup> During this period, broad efforts to

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in economic segregation); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 111, 115 (2003) [hereinafter Reynolds, *Intergovernmental Cooperation*]; George Gasper, Note, *The Economics of Flight: Why the Decentralization of Corporate America from Central Cities is Inevitable and What It Means to Older, Central Cities*, 10 GEO. J. ON POVERTY L. & POL'Y 247, 261 (2003).

47. BUZZ BISSINGER, *A PRAYER FOR THE CITY* 372 (1997) (showing that from 1992 to 1994, Philadelphia residents who moved to the suburbs earned almost two and one half times as much as the suburban residents who moved into the city); DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 60 (1999) [hereinafter RUSK, *INSIDE GAME/OUTSIDE GAME*] (stating that as of 1990, Baltimore accounted for 28% of the region's population but only 15% of the gross assessed valuation of property; Detroit fell from 24% of the region's population to 22% and from 7% of the gross assessed valuation of property to 6%); TODD SWANSTROM, *THE CRISIS OF GROWTH POLITICS: CLEVELAND, KUCINICH, AND THE CHALLENGE OF URBAN POPULISM* 68-70, 136-53 (1985) (Suburban homeowners were able to monopolize the positive externalities of the housing market so that suburban home values soared while inner city home values stagnated. In 1969, the average selling price of a single-family home in Cleveland "was only 53% of the average sales price in the suburbs." In 1979, "the average sales price of all one- to four-family properties in the city . . . was only 44 percent of the average sales price in the suburbs."); WIESE, *supra* note 39, at 955-92 (discussing "The Next Great Migration"); Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 734-41; Jargowsky, *supra* note 46, at 990-91 (showing increase in economic segregation); Reynolds, *Intergovernmental Cooperation*, *supra* note 46, at 111, 115; Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 162-63 (2005); Gasper, *supra* note 46, at 261.

48. MYRON ORFIELD, *CHICAGO METROPOLITICS: A REGIONAL AGENDA FOR MEMBERS OF THE U.S. CONGRESS* 30, 31 (1998), *available at* [http://www.brookings.edu/~/media/Files/rc/reports/1998/05metropolitanpolicy\\_Orfield/congrep6.pdf](http://www.brookings.edu/~/media/Files/rc/reports/1998/05metropolitanpolicy_Orfield/congrep6.pdf); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 15-16, 30 (1997); MYRON ORFIELD, *SEATTLE METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY IN THE PUGET SOUND REGION* 19 (1999); WILLIAM D. VALENTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 16-17 (2d ed. 1980); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2011-13, 2020-21 (2000).

49. KUSHNER, *APARTHEID IN AMERICA*, *supra* note 2, at 1-4; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making*

revitalize attractive city neighborhoods and declining older suburbs also existed.<sup>50</sup> Although separated by strict class identity, neighborhoods in the city and older suburbs—and to a lesser extent the newer edge suburbs—reflected an increasingly racial and ethnic diversity and assimilation.<sup>51</sup> Such revitalization typically generated gentrification whereby the wealthier new residents and shops displaced lower-income residents<sup>52</sup> and locally supporting commercial facilities,<sup>53</sup> thereby reducing the supply of affordable housing.<sup>54</sup> The national strategy to achieve residential equal opportunity through affirmative action and civil rights laws ultimately proved Pyrrhic.<sup>55</sup> Minority group members did benefit from employment discrimination laws; more jobs in nontraditional work<sup>56</sup> and the

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*Situation*,' 35 U. MICH. J.L. REFORM 749, 928-30 (2002).

50. See generally James J. Kelly, Jr., "We Shall Not be Moved": *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 928-30 (2006); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 1-2 (2003); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 691-93 (1994).

51. Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 736-37, 740.

52. John J. Betancur, *Can Gentrification Save Detroit? Definition and Experiences from Chicago*, 4 J.L. SOC'Y 1 (2002); Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39, 39 (2004); Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238, 238 (2007); Henry W. McGee, Jr., *Seattle's Central District, 1990-2006: Integration or Displacement?*, 39 URB. LAW. 167, 169 (2007) [hereinafter McGee, *Seattle's Central District*] (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

53. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, AND TOKYO* 251 (1991); SHARON ZUKIN, *THE CULTURES OF CITIES* 211 (1995); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 824-25 (1993); David J. Maurrasse & Jaclyn B. Bliss, *Comprehensive Approaches to Urban Development: Gentrification, Community, and Business in Harlem, New York*, 1 NW. J.L. & SOC. POL'Y 127, 137-38 (2006); Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2296-97 (1994).

54. Aoki, *supra* note 53, at 711; J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405-06 (2003); Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused by Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 360 (2002); Levy et al., *supra* note 52, at 238; Isis Fernandez, Note, *Let's Stop Cheering, and Let's Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409, 409-10, 417 (2005).

55. JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* §§ 8.1, 8.6 (2006) [hereinafter KUSHNER, *GOVERNMENT DISCRIMINATION*], available at WL Gov. Discrim. § 8:1, § 8:6; James A. Kushner, *New Urbanism: Urban Development and Ethnic Integration in Europe and the United States*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 27, 36-38 (2005) [hereinafter Kushner, *New Urbanism*].

56. Jonathan S. Leonard, *Antidiscrimination or Reverse Discrimination: The Impact of*

professions<sup>57</sup> were opened, and a burgeoning middle class was created.<sup>58</sup> However, housing discrimination laws failed to be administered or utilized to advance racial integration.<sup>59</sup> Voting rights laws, although effective in extending the vote to minority group members,<sup>60</sup> may have had the effect of discouraging assimilation as political power required compact minority communities.<sup>61</sup> Affirmative action was ineffective as it engendered majority public hostility and was limited by conservative courts ruling that racial considerations were largely prohibited in voting district drawing,<sup>62</sup> limited to a class of victims and group members of proven discrimination in employment and public contracting, limited to the extent of the proven bias,<sup>63</sup> and simply invalidated in the case of housing discrimination.<sup>64</sup> In the housing discrimination arena, most cases were brought

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*Changing Demographics, Title VII, and Affirmative Action on Productivity*, 19 J. HUMAN RES. 145, 145 (1984) (arguing that Title VII has played a significant role in increasing black employment).

57. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 947-49 (1982).

58. BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987); Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 732; Barbara Jordan, *Making It—Losing It*, 5 TEX. J. WOMEN & L. 217, 217 (1996); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997).

59. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050-52 (1989) [hereinafter Kushner, *The Fair Housing Amendments*]; James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUSING POL'Y DEBATE 537, 547 (1992) [hereinafter Kushner, *Federal Enforcement*].

60. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1082-84 (1991); Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. PA. J. CONST. L. 665, 687 (2003).

61. See Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial 'Intent' and the Legislative 'Results' Standards*, 50 GEO. WASH. L. REV. 689, 721 n.207 (1982); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1903-05 (1994).

62. See, e.g., *Bush v. Vera*, 517 U.S. 952, 957 (1996) (rejecting bizarrely shaped Texas congressional districts); *Shaw v. Hunt*, 517 U.S. 899, 902-03 (1996) (rejecting bizarrely shaped majority-black North Carolina congressional district); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (obtaining Justice Department preclearance not a compelling interest to justify affirmative action in designing Georgia congressional district). *But see Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (finding political considerations rather than race the overriding motive in establishing a safe North Carolina democratic district ostensibly allowing race to be a factor and a permissible means to serve a non-racial end).

63. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (invalidating affirmative action public works program absent study disclosing current discrimination); *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); KUSHNER, *GOVERNMENT DISCRIMINATION*, *supra* note 55, § 8:15.

64. See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (1988). *But cf. Raso v.*

by individuals. Even where the Justice Department brought litigation, affirmative action remedial obligations were rarely sought.<sup>65</sup> Affirmative action in primary, secondary,<sup>66</sup> and higher education<sup>67</sup> were largely limited and symbolic. Efforts to mandate suburban development of affordable or racially-integrated housing were limited to a few jurisdictions and rarely implemented in

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Lago, 135 F.3d 11, 17 (1st Cir. 1998) (sustaining affirmative action marketing plan that denied promised preferences to former urban renewal residents who were white and would have denied diversity); S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 871 (7th Cir. 1991) (sustaining affirmative marketing race-conscious referrals, outreach, and solicitation); Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1401, 1445-50 (arguing that affirmative marketing and other proactive strategies short of the use of racial preferences are legal). *See generally* KUSHNER, GOVERNMENT DISCRIMINATION, *supra* note 55, § 8:16; Kushner, *The Fair Housing Amendments*, *supra* note 59; Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 339 (2007) (arguing HUD has failed to administer Title VIII affirmatively to undo housing segregation); Adam Weiss, Note, *Grutter, Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1195 (2007) (arguing that *Grutter v. Bollinger*, 539 U.S. 306 (2003), supports affirmative action remedies in housing segregation litigation).

65. Kushner, *The Fair Housing Amendments*, *supra* note 59, at 1070, 1113-19; Kushner, *Federal Enforcement*, *supra* note 59, at 582.

66. *See Parents Involved in Cmtv. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007) (The Supreme Court rejected school actions in Seattle, Washington and Jefferson County, Kentucky, that voluntarily adopted student assignment plans relying on race to assign which school children would attend for the purpose of advancing racial integration. Justice Kennedy, however, along with the dissent constitute the majority in identifying diversity as a compelling educational goal. Moreover, the majority recognizes a compelling interest in avoiding racial isolation; race, according to Justice Kennedy and the majority, can be a factor in pursuing diversity in a multi-racial and ethnic society; school districts need not ignore the problem of *de facto* resegregation in schooling. School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.); KUSHNER, GOVERNMENT DISCRIMINATION, *supra* note 55, § 8:15; Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 640-55 (2007) (arguing for desegregation jurisprudence rather than affirmative action jurisprudence in reviewing voluntary desegregation policies in elementary grades and applying less than strict scrutiny).

67. *See Grutter*, 539 U.S. at 334-41 (sustaining law school admission policy that considers race and ethnicity among a number of unique characteristics in pursuit of a compelling interest in attaining a diverse student body); *Gratz v. Bollinger*, 539 U.S. 244, 271-76 (2003) (rejecting automatic advantage and preference to racial minority applicants to undergraduate college); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (invalidating setting aside of a number of seats for qualified minorities in medical school admission process).

a meaningful manner.<sup>68</sup>

#### IV. PHASE FOUR—HYPER-SEGREGATION: 1990-2008

Phase	Social Equity	Subsidy	Regulation
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth

The fourth phase, from 1990 to 2008, is hyper-segregation<sup>69</sup> and was marked by voluntary class, racial, and ethnic separation as more ethnic and racially concentrated neighborhoods grew or were established.<sup>70</sup> This is not to say that discrimination has significantly abated but that the dominant force yielding separation is voluntary decisions of members of all races and ethnic groups. One of the most dramatic changes in cities in the 1990s was that most city centers became majority “minority” for the first time in American history.<sup>71</sup>

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68. See *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (unique ruling requiring each community to provide its fair share of affordable housing); *see also* Sheryll D. Cashin, *Building Community in the Twenty-First Century: A Post-Integrationist Vision of the American Metropolis*, 98 MICH. L. REV. 1704, 1719 n.34 (2000) (noting that the racial integration experience of affordable housing in the developing suburbs is disappointing with more than eighty percent of New Jersey’s suburban affordable housing units occupied by whites) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)); Josh Getlin, *Home is Where the Hurt Was: After a Bruising Legal Fight, an Affluent New Jersey Town has Housing for the Poor. But It’s Still a Struggle to Keep Doors of Acceptance Open*, L.A. TIMES, Nov. 5, 2004, at A1 (describing how Mount Laurel finally developed an affordable housing project, but one that is a virtual all-minority “project” segregated from the now exclusive highly affluent suburban community).

69. MASSEY & DENTON, *supra* note 49, at 129; Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 798-99 (1996); Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 65 (2002); Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23, 29 (2004) (listing twenty-nine metropolitan areas with black-white hypersegregation in 2000 and observing that most of the metropolitan areas that were hypersegregated in 2000 were also hypersegregated in 1990).

70. See NANCY MCARDLE & GUY STUART, *THE CIVIL RIGHTS PROJECT, RACE, PLACE & SEGREGATION: REDRAWING THE COLOR LINE IN OUR NATION’S METROS* (2002); Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1, 24 (2001).

71. Alan Berube, *Racial and Ethnic Change in the Nation’s Largest Cities*, in 1 REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 137, 139-41 (Bruce Katz & Robert E. Lang eds., 2003) [hereinafter 1 REDEFINING URBAN & SUBURBAN AMERICA]; Bruce Katz & Robert E. Lang, *Introduction* to 1 REDEFINING URBAN & SUBURBAN AMERICA, *supra*, at 1, 1.

Neighborhoods increasingly were regenerated through gentrification and the investment of public and private funds.<sup>72</sup> "Between 1960 and 2000, the number of African Americans living in suburbs grew by approximately 9 million, representing a migration as large as the exodus of African Americans from the rural South in the mid-twentieth century. More than one-third of African Americans—almost 12 million people—lived in suburbs."<sup>73</sup> The divide between many minority communities, which were now in the city and the older suburbs, and the more affluent communities, predominantly in white newer suburbs, became more pronounced<sup>74</sup> despite back-to-the-city moves,<sup>75</sup> investment, the gentrification of attractive neighborhoods,<sup>76</sup> and despite the fact that segregation between blacks and non-blacks is at its lowest level since 1920.<sup>77</sup> Although minorities increased their presence in the suburbs<sup>78</sup> and the affluent were

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72. See Aoki, *supra* note 53, at 791-820; James Geoffrey Durham & Dean E. Sheldon III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 10-17 (1986); Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 508 (1991); Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 URB. LAW. 31, 31 (1982); Levy et al., *supra* note 52, at 238-40; Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, 931-33 (1985); Maurrasse & Bliss, *supra* note 53; Harold A. McDougall, *Gentrification: The Class Conflict Over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 177-79 (1982); Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 25-26 (1991); McGee, *Seattle's Central District*, *supra* note 52, at 167-73 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

73. WIESE, *supra* note 39, at 1.

74. Cashin, *Middle-Class Black Suburbs*, *supra* note 46, at 737-41.

75. See MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST., *DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES* (2001), available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf>; Michael H. Lang, *Gentrification*, in *HOUSING: SYMBOL, STRUCTURE, SITE* 158 (Lisa Taylor ed., 1990); Fernandez, *supra* note 54, at 411-13; Teri Karush Rogers, *Goodbye, Suburbs*, N.Y. TIMES, Jan. 8, 2006, available at [www.nytimes.com/2006/01/08/realestate/08cov.html](http://www.nytimes.com/2006/01/08/realestate/08cov.html).

76. See Betancur, *supra* note 52, at 1-8; Freeman & Braconi, *supra* note 52, at 39; Levy et al., *supra* note 52, at 238-40; McGee, *Seattle's Central District*, *supra* note 52, at 169-73, 208-22 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

77. Edward L. Glaeser & Jacob L. Vigdor, *Racial Segregation: Promising News*, in 1 *REDEFINING URBAN & SUBURBAN AMERICA*, *supra* note 71, at 211, 216.

78. See Malamud, *supra* note 58, at 969-70, 978-79 (middle-class blacks segregated in older enclave neighborhoods adjacent to central cities); see also Elizabeth D. Huttman & Terry Jones, *American Suburbs: Desegregation and Resegregation*, in *URBAN HOUSING SEGREGATION OF MINORITIES IN WESTERN EUROPE AND THE UNITED STATES* 335, 335-37 (Elizabeth D. Huttman et al. eds., 1991); Douglas S. Massey & Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 AM. J. SOC. 592, 613 (1988) (noting that blacks are less suburbanized than

returning to certain neighborhoods in the city,<sup>79</sup> the divide between neighborhoods during this period was still characterized by hyper-segregation.<sup>80</sup> Thus, while black-white segregation in metropolitan areas has declined in the past two decades and diversity has increased, the nation must nevertheless be characterized as having a high degree of racial separation.<sup>81</sup> Majority-black suburban neighborhoods generally provide fewer economic opportunities in terms of rising home values and access to good schools and jobs, making it harder for blacks to catch up and keep up financially with whites.<sup>82</sup> In 2005, “the average white person in the United States live[d] in a neighborhood that [was] more than 80 percent white, while the average black person live[d] in one that [was] mostly black.”<sup>83</sup> African Americans are the most residentially segregated group in the United States.<sup>84</sup> Black suburbanization did little to desegregate metropolitan areas, for while the movement of blacks to the suburbs signaled the lifting of the suburban-urban barrier, any optimism about greater residential integration between whites and blacks was short-lived.<sup>85</sup> The suburbs engaged

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Hispanics or Asians).

79. See Betancur, *supra* note 52, at 1-8; Freeman & Braconi, *supra* note 52, at 39; McGee, *supra* note 52, at 167-73, 208-22 (describing gentrification and redlining in a traditional minority neighborhood transitioning to a predominantly white enclave).

80. MASSEY & DENTON, *supra* note 49, at 129.

81. John R. Logan, *Ethnic Diversity Grows, Neighborhood Integration Lags*, in 1 REDEFINING URBAN & SUBURBAN AMERICA, *supra* note 71, at 235, 238.

82. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 130-31 (2004) (noting that lower quality schools encountered when moderately affluent non-whites voluntarily choose minority enclaves); Robert D. Bullard, *Introduction: The Significance of Race and Place*, in THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE 1, 3 (Robert D. Bullard ed., 2007) [hereinafter THE BLACK METROPOLIS]; Sheryll Cashin, *Dilemma of Place and Suburbanization of the Black Middle Class*, in THE BLACK METROPOLIS, *supra*, at 87, 88-96 (describing how poor blacks follow the middle class blacks to suburban communities).

83. MICHAEL T. MALY, BEYOND SEGREGATION: MULTIRACIAL AND MULTIETHNIC NEIGHBORHOODS IN THE UNITED STATES 1 (2005); see also KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005) (defending white enclaves).

84. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, at 15 (2002).

85. MALY, *supra* note 83, at 12. See generally DESEGREGATING THE CITY: GHETTOS, ENCLAVES, & INEQUALITY (David P. Varady ed. 2005) [hereinafter DESEGREGATING THE CITY].

in Smart Growth regulatory policies to slow development<sup>86</sup> and reduce sprawl,<sup>87</sup> using approaches such as urban growth boundaries;<sup>88</sup> conservation easement purchases;<sup>89</sup> and, in Maryland's urban service districts where public subsidies are targeted to designated growth areas and corridors,<sup>90</sup> incentives for infill development,<sup>91</sup> home purchases,<sup>92</sup> and the transfer of infrastructure costs to new

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86. See *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 908-09 (9th Cir. 1975) (sustaining annual permit cap); *Golden v. Planning Bd.*, 285 N.E.2d 291, 301-05 (N.Y. 1972) (sustaining timed sequential zoning providing for development conditioned on the concurrent extension of infrastructure). But see *Bldg. Indus. Ass'n v. City of Oceanside*, 33 Cal. Rptr. 2d 137, 154-55 (Ct. App. 1994) (invalidating annual building cap); *Toll Bros., Inc. v. W. Windsor Twp.*, 712 A.2d 266, 269-72 (N.J. Super. Ct. App. Div. 1998) (invalidating timed growth control ordinance).

87. See FREILICH, *supra* note 22, at 15-29, 167-202 (noting the need for Smart Growth policies because of the costs associated with sprawl and describing Smart Growth in counties in Utah, Florida, Colorado, and California); George Galster et al., *Wrestling Sprawl to the Ground: Defining and Measuring an Elusive Concept*, 12 HOUSING POL'Y DEBATE 681, 687-98 (2001) (offering alternative definitions based on low value density, continuity, concentration, clustering, centrality, nuclearity, mixed uses, or proximity).

88. See Michael Lewyn, *Sprawl, Growth Boundaries and the Rehnquist Court*, 2002 UTAH L. REV. 1, 4-8 [hereinafter Lewyn, *Sprawl*] (describing Oregon's urban growth boundary program); Robert Stacey, *Urban Growth Boundaries: Saying "Yes" to Strengthening Communities*, 34 CONN. L. REV. 597, 597-609 (2002) (examining the urban growth boundary program in Portland, Oregon).

89. James Boyd et al., *The Land and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 215 (2000); J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 URB. LAW. 19, 20, 72-74 (2007); Connie Kertz, *Conservation Easements at the Crossroads*, 34 REAL ESTATE L.J. 139, 139-46 (2005); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 554-55, 559-83 (2006) (applying behavioral psychology to encourage the acceptance of conservation easements by individual landowners); Gwenann Seznec, Note, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L.J. 479, 480-82, 516-25 (2005). But see Valerie Cotsalas, *Preserving Land, but Not for Farmers*, N.Y. TIMES, Aug. 5, 2007 (describing how land prices have inflated on Long Island so that developers are purchasing land subject to conservation easements and using it as lawns for adjacent luxury homes and witnessing the end of farming).

90. See PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 64-65 (2001); John W. Frece, *Smart Growth: Prioritizing State Investments*, 15 NAT. RESOURCES & ENV'T 236, 236-38, 273 (2000); John W. Frece & Andrea Leahy-Fuchek, *Smart Growth and Neighborhood Conservation*, 13 NAT. RESOURCES & ENV'T 319, 319-20 (1998); J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 J. LAND USE & ENVTL. L. 377, 408-18 (2004).

91. Thomas A. Gihring, *Incentive Property Taxation: A Potential Tool for Urban Growth Management*, 65 J. AM. PLAN. ASS'N 62, 76 (1999) (recommending heavier taxes on sprawl development).

92. Smart Growth Online, Revival of Maryland's Live Near Your Work Program Draws Criticism From Smart Growth Advocates, <http://www.smartgrowth.org/news/article.asp?art=5660&>

residents.<sup>93</sup> The result of all of these influences was typically higher cost housing<sup>94</sup> and even greater sprawl as developers often leap-frog jumped over regulating communities to develop even farther out.<sup>95</sup> This period was the time of excessive traffic congestion,<sup>96</sup> air pollution,<sup>97</sup> obesity,<sup>98</sup> diabetes,<sup>99</sup> and

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State=21 (last visited Apr. 16, 2008).

93. *Dolan v. City of Tigard*, 512 U.S. 374, 378 (1994) (invalidating dedication of land for floodplain and pedestrian/bicycle pathway as no individualized evidence that exaction roughly proportional to impact of proposed development); *J.W. Jones Cos. v. City of San Diego*, 203 Cal. Rptr. 580, 582 (Ct. App. 1984) (sustaining facilities benefit assessment districts where impact fees can be paid for each home at time of building permit application); *N. Ill. Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 397 (Ill. 1995) (sustaining transportation impact fee); KUSHNER, *SUBDIVISION LAW*, *supra* note 41, §§ 6.01-.08; Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMUL. REV. 177, 182 (2006).

94. NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 42, at 213-15; James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45 (2002) [hereinafter Kushner, *Smart Growth*].

95. James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 72-73 (1994) [hereinafter Kushner, *Growth Management*]; Stephanie Yu, Note, *The Smart Growth Revolution: Loudoun County, Virginia and Lessons to Learn*, 7 ENVTL. LAW. 379 (2001).

96. MICHAEL BERNICK & ROBERT CERVERO, *TRANSIT VILLAGES IN THE 21ST CENTURY* 43-44 (1997) (stating traffic congestion costs \$73 billion annually in the United States with each commuter paying \$375 in extra fuel and maintenance); ROBERT CERVERO, *THE TRANSIT METROPOLIS: A GLOBAL INQUIRY* 40 (1998) (stating social costs of traffic congestion in most industrialized countries between two and three percent of GDP); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 8 (1994); KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 46-48; Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 466 (2003); Morris Newman, *The Driving Factor: Commute Time is Becoming Increasingly Important in Home-Buying Decisions*, L.A. TIMES, Oct. 5, 2003, at K1 (noting that Los Angeles drivers with a thirty-minute commute spend 108 hours annually stopped in traffic as of 2001).

97. PETER FREUND & GEORGE MARTIN, *THE ECOLOGY OF THE AUTOMOBILE* 27-33 (1993) (noting that 120,000 annual U.S. deaths are from air pollution, generating \$4.3 billion in health costs); JAMES A. KUSHNER, *HEALTHY CITIES: THE INTERSECTION OF URBAN PLANNING, LAW AND HEALTH* 97-99 (2007) [hereinafter Kushner, *Healthy Cities*]; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 37-41; Marla Cone, *State's Air is Among Nation's Most Toxic: Only New York Has a Higher Risk of Cancer Caused by Airborne Chemicals, the EPA Says*, L.A. TIMES, Mar. 22, 2006, at A1; *Researchers Link Childhood Asthma to Exposure to Traffic-Related Pollution*, SCIENCE DAILY, Sept. 21, 2005, <http://www.sciencedaily.com/releases/2005/09/050921082651.htm> (stating that “[f]or every 1.2 kilometers . . . the student lives closer to the freeway, asthma risk increased 89 percent” according to University of Southern California study).

98. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 141-53; NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., *HEALTH, UNITED STATES, 2002—WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS* 213-15 tbls. 70 & 71 (2003), available at <http://www.cdc.gov/nchs/data/hus/hus02.pdf> (reporting a 300% increase in overweight children

prohibitively costly health care which was made worse by motor vehicle crashes,<sup>100</sup> the largest cost of care.<sup>101</sup> Smart Growth fell short of its goal; sprawl

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over the last three decades and 64.5% of Americans over age twenty were overweight and 30.5% were obese in 1999-2000, up 8% from 1988-1994, while 15% of children aged six to nineteen years of age overweight, a 4% increase); NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 1999-2000, *available at* <http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese/obse99.htm> (reporting that nearly two-thirds of United States adults aged twenty to seventy-four are overweight, and 31% are obese); OFFICE OF THE SURGEON GEN., U.S. DEP'T HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at 2 (2001), *available at* <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (reporting that at least 60% of adult Americans fail to meet the Surgeon General's minimum targets for physical activity, defined as thirty minutes of moderate-to-vigorous activity most days of the week).

99. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 145-53 (stating that obese people are as much as forty times more likely to develop diabetes); *see also* Anne Fagot-Campagna et al., *Type 2 Diabetes Among North American Children and Adolescents: An Epidemiologic Review and a Public Health Perspective*, 136 J. PEDIATRICS 664, 669-70 (2000); Frank B. Hu et al., *Diet, Lifestyle, and the Risk of Type 2 Diabetes Mellitus in Women*, 345 N. ENG. J. MED. 790, 793-96 (2001); Ali H. Mokdad et al., *Prevalence of Obesity, Diabetes, and Obesity-Related Health Risk Factors, 2001*, 289 JAMA 76, 77 (2003) (obesity and overweight has increased by 74% since 1991 and diabetes by 61% since 1990; in 2001, 7.9% of all adults in the United States reported having the disease); Ali H. Mokdad et al., *The Continuing Epidemics of Obesity and Diabetes in the United States*, 286 JAMA 1195, 1196-97 (2001) (reporting obesity increase of 61% since 1991, diabetes 49% since 1991); K.M. Venkat Narayan et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 JAMA 1884, 1889 (2003) (study of women indicating that those who develop diabetes before age forty will lose an average of fourteen years of life but twenty-two years if quality of life is considered); CDC's Diabetes Program—Data & Trends, <http://www.cdc.gov/diabetes/statistics/prev/national/figpersons.htm> (last visited Apr. 16, 2008) (diabetes has doubled in prevalence since 1980).

100. KEVIN KINSELLA & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, *AN AGING WORLD: 2001*, at 10, 126-27 (2001), *available at* <http://www.census.gov/prod/2001pubs/p95-01-1.pdf> (reporting America's population of those older than age sixty-five will double by the year 2030 from 2006); KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 141-51 (noting challenge reflected by rapidly escalating health care costs shows no sign of abating since numerous pressures such as emerging diseases, threats of bioterrorism, new technology and discoveries, shortages of caregivers, increasing life expectancy, immigration, adverse environmental health consequences, and others, all significantly impact the demand for services); NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., *HEALTH, UNITED STATES, 2003—WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS* 306 tbl. 112 (2003), *available at* <http://www.cdc.gov/nchs/data/hus/hus03.pdf> (reporting taxpayer cost of this rapidly inflating system in 2001 was \$1.4 trillion annually); Gerald F. Anderson et al., *Health Spending and Outcomes: Trends in OECD Countries, 1960-1998*, 19 HEALTH AFF. 149, 150-51 (2000) (noting health care system accounted for 5.2% of the gross domestic product in 1960); Gerald F. Anderson et al., *Health Spending in the United States and the Rest of the Industrialized World: Examining the Impact of Waiting Lists and*

expanded.<sup>102</sup> "Rather than disappearing, residential segregation is extending beyond the city limits and adding new colors, and it promises to persist as an American dilemma well into the twenty-first century."<sup>103</sup>

This Article was prepared for a symposium and conference celebrating the fortieth anniversary of the enactment of Title VIII. This Author was honored to participate in the celebrations of the twentieth<sup>104</sup> and thirtieth<sup>105</sup> anniversaries of

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*Litigation Reveals No Significant Effects on the U.S. Health Spending Differential*, 24 HEALTH AFF. 903, 905 (2005) (14.6% as of 2002); Gerald F. Anderson et al., *It's the Prices Stupid: Why the United States is So Different from Other Countries: Higher Health Spending but Lower Use of Health Services Adds Up to Much Higher Prices in the United States Than in Any Other OECD Country*, 22 HEALTH AFF. 89, 91 (2003) (reporting health costs at 13% of GDP in 2000); Ricardo Alonso-Zaldivar, *Health Costs Take Big Bite From Economy: Report Finds Spending Eats Up 24% of Recent Growth, Far Outpacing Defense and Education*, L.A. TIMES, Feb. 9, 2005, at A14, available at <http://news.orb.com/stories/latimes/2005/0209/healthcarecoststakebigbitefromeconomy.php> (reporting forty-five million Americans lack any health insurance despite rapidly rising government and private spending); Julie Appleby, *Health Spending Rises at Blistering Pace: 20% of GDP Could Go Towards Care by 2015*, USA TODAY, Feb. 22, 2006, at B1 (reporting \$4 trillion or \$12,320 per capita projected by 2015; health care costs are currently 16.2% of GDP and are projected to reach 20% of the national economy by 2015); Debora Vrana, *Rising Premiums Threaten Job-Based Health Coverage*, L.A. TIMES, Sept. 15, 2005, at A1 (noting annual cost of health insurance for a family of four exceeds annual income of a minimum wage worker); Boston University School of Public Health—Health Reform Program, <http://www.healthreformprogram.org> (last visited Mar. 13, 2006) (reporting U.S. healthcare federal spending at \$1.9 trillion in 2005 up from \$621 billion in 2000).

101. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 85-91; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 41-44; Ctr. for Disease Control, U.S. Dep't Health & Human Servs., *Motor-Vehicle Safety: A 20th Century Public Health Achievement*, 48 MORBIDITY AND MORTALITY WKLY. REP. 369, 372 (1999) (noting crashes cost the United States \$200 billion annually); *Costs of Treating Trauma Disorders Now Comparable to Medical Expenditures for Heart Disease*, AHRQ NEWS & NUMBERS, Jan. 25, 2006, <http://www.ahrq.gov/news/nn/nn012506.htm> (reporting agency for Healthcare Research and Quality reports spending for trauma from automobile crashes and violence nearly doubled from 1996 to 2003 to \$71.6 billion, the largest component of medical cost involving forty million trauma victims annually as compared to \$67.8 billion for heart disease and \$48.4 billion for cancer).

102. Thomas Benton Bare III, *Recharacterizing the Debate: A Critique of Environmental Democracy and an Alternative Approach to the Urban Sprawl Dilemma*, 21 VA. ENVTL. L.J. 455, 464 (2003) (continuing subsidies for sprawl); Gerrit-Jan Knaap & John W. Frece, *Smart Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 445, 453 (2007) (waning political support in Maryland); Timothy B. Wheeler, *Searching for Signs of Intelligent Growth*, HARTFORD COURANT, Sept. 2, 2007 (finding little benefit of Smart Growth in Maryland after ten years; while 75% of homes built within growth areas, 75% of land on which homes built outside of designated growth areas).

103. Logan, *supra* note 81, at 235, 255.

104. The Fair Housing Act After Twenty Years, Conference at Yale Law School, New Haven, Mar. 25-26, 1988. See James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing*

that enactment. Having advocated the use of Title VIII to achieve the dream of an integrated and colorblind society,<sup>106</sup> including more than twenty years maintaining a treatise on fair housing<sup>107</sup> and volunteering as an activist in the fair housing movement,<sup>108</sup> the Author of this Article is unfortunately ready to declare that the effort was ineffective. It appears that housing discrimination and racial segregation are continuing and largely unabating.<sup>109</sup> Despite statistical reductions in separation between whites and certain non-white groups, economic, racial, ethnic, and social segregation is still the pervasive geographical pattern, often masked by vague definitions of race such as characterizing ethnic minorities as white for census purposes. In addition to discrimination in sales and rentals, African Americans are denied mortgages and home improvement loans at twice the rate of whites.<sup>110</sup> After forty years Title VIII, although a useful tool for the occasional victim or agency willing to battle the isolated housing provider, never

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*Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988), reprinted in THE FAIR HOUSING ACT AFTER TWENTY YEARS 48 (Robert G. Schwemmm ed., 1989) [hereinafter Kushner, *An Unfinished Agenda*].

105. Fair Housing 1968-1998: Promises Kept, Promises Broken, Conference at University of Miami School of Law, February 6-7, 1998 (celebrating the thirtieth anniversary of the Fair Housing Act and the tenth anniversary of the Fair Housing Amendments Act). See James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 931 (1998) [hereinafter Kushner, *A Comparative Vision*].

106. KUSHNER, APARTHEID IN AMERICA, *supra* note 2, at 37-44; Kushner, *The Fair Housing Amendments*, *supra* note 59, at 1062; Kushner, *Federal Enforcement*, *supra* note 59, at 537.

107. JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995 & Supp. 2000) [hereinafter KUSHNER, FAIR HOUSING: DISCRIMINATION].

108. Fair Housing Congress of Southern California (Chairman of the Board of Directors 1985-86, President 1984-1985, member of Board 1983-1986).

109. Robert G. Schwemmm, *Why Do Landlords Still Discriminate (And What Can Be Done About It?)*, 40 J. MARSHALL L. REV. 455, 456-57 n.6 (2007) (Whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time. The rate of rental discrimination against Hispanics was actually higher than had been shown in a similar study in 1989, and the 2000 figure for blacks was down only a few percentage points compared to its 1989 counterpart. Additional phases of this study found similar rates of rental discrimination against other ethnic minorities (citing MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000, at i-iv (2002))). See MARGERY AUSTIN TURNER & STEPHEN L. ROSS, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 2-ASIANS AND PACIFIC ISLANDERS iv (2003) (reporting that Asians and Pacific Islanders experienced adverse treatment compared to whites in 21.5% of rental tests); MARGERY AUSTIN TURNER & STEPHEN L. ROSS, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 3-NATIVE AMERICANS iii (2003) (reporting that Native Americans experienced consistently unfavorable treatment compared to whites in 28.5% of rental tests)).

110. Robert D. Bullard, *Introduction: The Significance of Race and Place*, in THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE 1, 6 (Robert D. Bullard ed., 2007).

received administrative and enforcement leadership or adequate funding and is unfortunately a relic of Phase II community development in the United States.

## V. TOWARD PHASE FIVE—SMART GROWTH

Phase	Social Equity	Subsidy	Regulation
2008-2020 Smart Growth	New Urbanism New Suburbanism	Public Transport Tax Sharing	Densification and Inclusion

The future will be about sustainability, health, and fairness. Smart Growth is growth that supports environmental,<sup>111</sup> economic,<sup>112</sup> and social sustainability.<sup>113</sup> Sustainability refers to policies that allow future generations to enjoy the resources and quality of life of today.<sup>114</sup> Really Smart Growth, as compared to the vague notion of improved urban design that has been advanced and implemented through variations of traditional development patterns, is growth based on urban design for the pedestrian rather than for the automobile.<sup>115</sup> Connectivity through public transport is a critical component. Government priorities must shift to improved public transport,<sup>116</sup> alternative energy sources,<sup>117</sup>

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111. Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 297-99 (2000).

112. See generally Emery N. Castle et al., *The Economics of Sustainability*, 36 NAT. RESOURCES J. 475 (1996); Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 63-70 (2001); Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 277 (1995).

113. See generally James A. Kushner, *Social Sustainability: Planning for Growth in Distressed Places—The German Experience in Berlin, Wittenberg, and the Ruhr*, 3 WASH. U. J.L. & POL'Y 849 (2000), published in *EVOLVING VOICES IN LAND USE LAW* Ch. 13 (2000) [hereinafter Kushner, *Social Sustainability*].

114. See generally John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 3 (1998); see also Beatley & Collins, *supra* note 111, at 297-99.

115. KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 61-66; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 63-65, 71-75; Kushner, *Smart Growth*, *supra* note 94, at 45.

116. VUKAN R. VUCHIC, *TRANSPORTATION FOR LIVEABLE CITIES* 248-58 (1999); Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 373 (2000); Hannibal B. Johnson, *Making the Case for Transit: Emphasizing the “Public” in Public Transportation*, 27 URB. LAW. 1009, 1010 (1995); Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America’s Poor*, 12 GEO. J. ON POVERTY L. & POL’Y 155, 169-76 (2005).

117. AL GORE, *AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT* 166-72 (2006). See generally *RENEWABLE ENERGY: POWER FOR*

efficient building technology,<sup>118</sup> sustainable infrastructure,<sup>119</sup> and agricultural policies.<sup>120</sup> Truly Smart Growth emphasizes public transport, with transit-served urban and suburban communities developing in a model of heightened densification, infill, and access.<sup>121</sup> Urban growth boundaries<sup>122</sup> would be established, and development would focus on infill, brownfields,<sup>123</sup> and areas of the city that are lying fallow such as rail yards, former industrial sites, and

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A SUSTAINABLE FUTURE (Godfrey Boyle ed., 2d ed. 2004); RENEWABLE RESOURCES AND RENEWABLE ENERGY: A GLOBAL CHALLENGE (Mauro Graziani & Paolo Fornasiero eds., 2007).

118. *See generally* PETER BUCHANAN, TEN SHADES OF GREEN: ARCHITECTURE AND THE NATURAL World (2005); BUILDING WITHOUT BORDERS: SUSTAINABLE CONSTRUCTION FOR THE GLOBAL VILLAGE (Joseph F. Kennedy ed., 2004) (emphasis on straw); DEAN HAWKES & WAYNE FORSTER, ENERGY EFFICIENT BUILDINGS: ARCHITECTURE, ENGINEERING, AND ENVIRONMENT (2002); PETER F. SMITH, ARCHITECTURE IN A CLIMATE OF CHANGE: A GUIDE TO SUSTAINABLE DESIGN (2d ed. 2005); JAMES STEELE, ECOLOGICAL ARCHITECTURE: A CRITICAL HISTORY (2005); Stephen T. Del Percio, *The Skyscraper, Green Design & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?*, 28 ENVIRONS ENVTL. L. & POL'Y 117 (2004); Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397 (2005).

119. FRITJOF CAPRA, THE HIDDEN CONNECTIONS: A SCIENCE FOR SUSTAINABLE LIVING 265-68 (2002); CAROL INSKIPP, REDUCING AND RECYCLING WASTE (2005); Timothy Beatley & Richard Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 193, 196-205 (2002).

120. *See generally* GLOBAL DEVELOPMENT OF ORGANIC AGRICULTURE: CHALLENGES AND PROSPECTS (Niels Halberg et al. eds., 2006); Lisa Chamberlain, *Skyfarming*, N.Y. MAG., Apr. 2, 2007, available at <http://www.nymag.com/news/features/30020> (discussing the research of Dickson Despommier of Columbia University suggesting that the future of agriculture may call for urban high-rise farms that involve green architecture).

121. *See* KUSHNER, HEALTHY CITIES, *supra* note 97, at 61-66; KUSHNER, THE POST-AUTOMOBILE CITY, *supra* note 2, at 63-65, 71-75; Kushner, *Smart Growth*, *supra* note 94, at 48-61.

122. *See generally* Lewyn, *Sprawl*, *supra* note 88; Stacey, *supra* note 88.

123. *See generally* James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857 (2006). *See also* CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 2-3 (1997); Joel B. Eisen, "Brownfields of Dreams"? *: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 890-91; Denise Ferkich Hoffman & Barbara Coler, *Brownfields and the California Department of Toxic Substances Control: Key Programs and Challenges*, 31 GOLDEN GATE U. L. REV. 433, 449-63 (2001); Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Development*, 34 B.C. ENVTL. AFF. L. REV. 479, 480 (2007); Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 120 (2000); Richard G. Opper, *The Brownfield Manifesto*, 37 URB. LAW. 163, 178-80 (2005); Nancy Perkins, *A Tale of Two Brownfield Sites: Making the Best of Times from the Worst of Times in Western Pennsylvania's Steel Valley*, 34 B.C. ENVTL. AFF. L. REV. 503, 528-32 (2007) (critique of two projects, financing, and impacts); Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 64-67 (2003).

parking lots.

New Urbanism, largely led by developers, may influence and shape this phase.<sup>124</sup> New Urbanism calls for higher density, walkable communities developed at human scale to accommodate and enhance the experience of pedestrians.<sup>125</sup> Mixed-use higher density community design is an imperative of escalating population, fuel and commuting costs, and the rising cost of utilities that are making the single-family detached home—the icon of the twentieth century—the horse and buggy of the twenty-first century. Smart Growth would utilize New Urbanist designs to create pedestrian-friendly models of the European compact city, street car neighborhoods and suburbs, and the small industrial and mill towns that thrived prior to World War II. Linking destinations through public transit, increasing density, improving accessibility, and choices in the size and cost of homes would stimulate racial and ethnic diversity.<sup>126</sup> The Portland experience indicates that greater integration occurs if apartments are dispersed and available along convenient transit lines.<sup>127</sup>

Although the Author remains an unadulterated integrationist, there is reason to question the value of integration and diversity in contemporary American culture. The questions of racial and ethnic cohesion, integration, and assimilation require a very different analysis from the simplistic segregation-integration dichotomy of the twentieth century. Robert Putnam, the author of the best selling book *Bowling Alone*,<sup>128</sup> an inquiry into the reasons for the withdrawal of Americans from community activities and civic participation, has recently published a massive study on the effects of community diversity. His study, which he was reluctant to release given testing results he was unhappy to find, concluded that the greater the diversity in a community, the fewer people vote,

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124. Kushner, *New Urbanism*, *supra* note 55, at 39-40; Kushner, *Smart Growth*, *supra* note 94, at 61-72.

125. See PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM (1993); ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 101-03 (2000); JILL GRANT, PLANNING THE GOOD COMMUNITY: NEW URBANISM IN THEORY AND PRACTICE (2006); PETER KATZ, THE NEW URBANISM: TOWARDS AN ARCHITECTURE OF COMMUNITY (1994); KUSHNER, *HEALTHY CITIES*, *supra* note 97, at 61-66; KUSHNER, *THE POST-AUTOMOBILE CITY*, *supra* note 2, at 65-69, 85; EMILY TALEN, NEW URBANISM & AMERICAN PLANNING: THE CONFLICT OF CULTURES (2005).

126. Kushner, *New Urbanism*, *supra* note 55, at 39-40; Kushner, *Smart Growth*, *supra* note 94, at 61-72 (noting Portland has emphasized light rail, trams, and public transport, generating transit villages and an abundance of attractive multi-family living opportunities in urban and suburban walkable neighborhoods with most new development within a block of a transit stop and leads the nation in its increasing rate of racial residential integration).

127. ARTHUR C. NELSON ET AL., BROOKINGS INST., THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE (2002), <http://www.brookings.edu/es/urban/publications/growthmang.pdf> (reporting on Portland studies); Kushner, *Smart Growth*, *supra* note 94, at 53-57.

128. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

the less they volunteer, the less they give to charity, and the less they work on community projects.<sup>129</sup> Additional findings were that ethnically and racially diverse neighborhoods lower social capital, generate distrust among neighbors, and increase television viewing.<sup>130</sup> Like myself, Putnam hopes and anticipates that this unsatisfactory phenomenon is transitory on the way to assimilation. Scott Page, a University of Michigan political scientist and author of the book *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*,<sup>131</sup> does not question the Putnam findings but suggests that, despite civic withdrawal, diversity has a positive impact on productivity and innovation because a greater likelihood of solving problems exists when utilizing different ways of thinking among people from different cultures.<sup>132</sup> Another study by economist Edward Glaeser of Harvard suggests that greater ethnic diversity in the United States is the reason for significantly lower social welfare spending in America as compared to Europe.<sup>133</sup> This “diversity paradox,” or simply continued racial hostility, suggests that the politically correct rhetoric that we celebrate diversity fails to reflect the Nation’s beliefs and a serious review of integration and immigration policies should be undertaken rather than avoided. A study by Patrick Bayer, Fernando Ferreira, and Robert McMillan, while finding that the college-educated are willing to pay \$58 more per month to live in a neighborhood that has 10% more college-educated households, observed that blacks are willing to pay \$98 more per month to live in a neighborhood that has 10% more black households.<sup>134</sup> Thus, African Americans are no more enthralled with integration than whites appear to be.<sup>135</sup>

The failure of civil rights strategies to generate class and racial integration argues for higher density, mixed tenure of home occupancy, and income as the more attractive strategy to generate increased class and ethnic integration.<sup>136</sup>

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129. See Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds that Diversity Hurts Civic Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, BOSTON GLOBE, Aug. 5, 2007, at D1.

130. *Id.*

131. SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

132. See Jonas, *supra* note 129.

133. *Id.*; see Alberto Alesina et al., *Why Doesn’t the United States Have a European-Style Welfare State?*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY (2001), available at [http://www.wcfia.harvard.edu/sites/default/files/423\\_0332-Alesina11/pdf](http://www.wcfia.harvard.edu/sites/default/files/423_0332-Alesina11/pdf).

134. Patrick Bayer et al., *Tiebout, Social Multipliers, and the Demand for School Quality* 20-25 (Nat’l Bureau of Econ. Research, Working Paper No. 10871, 2004), available at <http://www.nbr.org/papers/W10871.pdf>.

135. See *How Much Will You Pay to Live Near People Like You*, TERRADAILY, Sept. 5, 2007, available at [http://www.terrardaily.com/reports/How\\_Much\\_Will\\_You\\_Pay\\_to\\_Live\\_Near\\_People\\_Like\\_You\\_999.html](http://www.terrardaily.com/reports/How_Much_Will_You_Pay_to_Live_Near_People_Like_You_999.html)

136. ARTHUR C. NELSON ET AL., THE SOCIAL IMPACTS OF URBAN CONTAINMENT 148 (2007); Kushner, *New Urbanism*, *supra* note 55, at 39-40. But see Tridib Banerjee & Niraj Verma, *Sprawl and Segregation: Another Side of the Los Angeles Debate*, in DESEGREGATING THE CITY, *supra*

Despite the ostensible lack of enthusiasm for diversity, I believe it is essential to overcome fear, distrust, and the walled metropolis as an essential component of community. Walkable and diverse urban neighborhoods are popular with a wide array of income, age, and ethnic groups suggesting that New Urbanism as a choice for community design will be popular. However, the New Urbanism in this new phase might differ from prior urban design improvement strategies in that it may be market-driven and promoted by developers. Presently, the spread of New Urbanist, walkable communities is constrained by unsound policies that discourage adequately funded public transit and by zoning codes written after World War II that have long ceased to serve health, welfare, or safety.<sup>137</sup> Yet, Putnam's work would suggest that a dispersed population does not necessarily generate an assimilated, socially cohesive society.

Current tax policies generate quality infrastructure for affluent communities, but inadequate services for those neighborhoods that are not wealthy. Communities segregated by income result in unsustainable and unstable districts housing the poor and prevent stability, economic growth, and regeneration. The antidote may be mixed-income neighborhoods. A regional tax base could further aid in equalizing infrastructure and reducing other barriers to an enhanced quality of life. If accomplished, suburbs would no longer need to compete with one another for retail centers nor exclude apartments. A shared tax base could encourage communities to aggressively pursue Smart Growth, transit-oriented development, and housing densification with sufficient tax proceeds to fund adequate infrastructure.<sup>138</sup> Cities that have lost their tax base could be regenerated in part by conversion to a regional shared tax base. This Article suggests that the United States may be entering a fifth post-World War II phase of community evolution—one of true Smart Growth.

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note 85, at 200, 200-12 (finding less diversity with functional specialization although the research is inadequate and the relationship unclear); Rolf Pendall, *Does Density Exacerbate Income Segregation? Evidence from U.S. Metropolitan Areas, 1980-1990*, in *DESEGREGATING THE CITY*, *supra* note 85, at 175, 175-99 (acknowledging that density is less important than other factors and arguing that higher density can generate greater class and ethnic segregation as the community becomes more desirable absent additional policies including inclusionary zoning).

137. See e.g., Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 637 (2006) (using current zoning schemes across America it would be illegal to build classic communities such as Charleston, Savannah, Key West, or Alexandria as well as traditional neighborhoods); Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986).

138. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 105-108 (2002); RUSK, *INSIDE GAME/OUTSIDE GAME*, *supra* note 47, at 222-48; see Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575 (2001).

## CONCLUSION

PHASES	Social Equity	Subsidy	Regulation
1945-1968 Decentralization	Apartheid	Infrastructure	Zoning
1968-1975 Hyper-Sprawl	White Flight Concentrated Poverty	Taxation	Subdivision
1975-1990 Class Segregation	Assimilation	Revitalization	Affirmative Action
1990-2008 Hyper-Segregation	Voluntary Separation	Gentrification and Regeneration	Smart Growth
2008-2020 Smart Growth	New Urbanism New Suburbanism	Public Transport Tax Sharing	Densification and Inclusion

We have seen phases of urban evolution over the past fifty years: The first phase, from World War II until 1968, followed a pattern of decentralization marked by extraordinary investment in suburban infrastructure and strictly segregated, rapid suburbanization. The second phase, 1968 to 1975, was marked by hyper-sprawl as jobs shifted to the suburbs, and the cities lost their population and tax base. The third phase, 1975 to 1990, was characterized by class segregation; the poor were concentrated in the city and the affluent in the suburbs. The fourth phase, 1990 to 2008, can be described as hyper-segregation; voluntary class, racial, and ethnic segregation generated more ethnic and racially concentrated neighborhoods. The observations and lessons learned from reviewing these phases of urban evolution have been that traditional urban infrastructure and land regulation have failed to generate neighborhood class, racial, or ethnic diversity; traditional urban planning and land regulation have rendered the nation more segregated by race, ethnicity, and class; and that civil rights initiatives as well as Smart Growth reforms have failed to generate improved living conditions through urban evolution. Today we are living with the challenges of decentralization, hyper-sprawl, class segregation, and hyper-segregation, and we must address the negative consequences of strategies undertaken and strategies not undertaken during that time. The models of Smart Growth and New Urbanism; policies supporting expanded public transport, health, affordable housing, and walkable, safe, accessible communities; and leadership knowledgeable in these areas could lead to communities that are healthful, satisfying, and more diverse. Smart Growth is growth that supports environmental, economic, and social sustainability. It is growth based on urban design for the pedestrian rather than the automobile. Global warming, climate

change,<sup>139</sup> and the arrival of peak oil,<sup>140</sup> at a time when the world's fossil fuel demand is reaching unsatisfiable levels,<sup>141</sup> coupled with the increasingly recognized failure of the twentieth century American urban model,<sup>142</sup> require a new, more sustainable regeneration of neighborhoods and urban community design—one that generates improved access, opportunity, and quality of life.

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139. GORE, *supra* note 117; *see generally* CLIMATE CHANGE POLICY: A SURVEY (Stephen H. Schneider et al. eds., 2002); CLIMATE CHANGE: SCIENCE, STRATEGIES, & SOLUTIONS (Eileen Claussen et al. eds., 2001); COMM. ON SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS, NAT'L ACADEMIES, SURFACE TEMPERATURE RECONSTRUCTIONS FOR THE LAST 2,000 YEARS (2006); 1 BRUCE E. JOHANSEN, GLOBAL WARMING IN THE 21ST CENTURY: OUR EVOLVING CLIMATE CRISIS (2006); JOHN HOUGHTON, GLOBAL WARMING: THE COMPLETE BRIEFING (2d ed. 1997); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICY MAKERS (2007), *available at* [http://www.aaas.org/news/press\\_room/climate\\_change/media/4th\\_spm2feb07.pdf](http://www.aaas.org/news/press_room/climate_change/media/4th_spm2feb07.pdf); A. BARRIE PITTOCK, CLIMATE CHANGE: TURNING UP THE HEAT (2005); J.F. RISCHARD, HIGH NOON: TWENTY GLOBAL PROBLEMS, TWENTY YEARS TO SOLVE THEM 70-75 (2002); SPENCER R. WEART, THE DISCOVERY OF GLOBAL WARMING 160-92 (2003).

140. LESTER R. BROWN, PLAN B 2.0: RESCUING A PLANET UNDER STRESS AND A CIVILIZATION IN TROUBLE 39 (2006).

141. *See id.* at x, 21-40 (projecting that China will require ninety-nine million barrels of oil daily by 2031, compared to the current world production of eight-four million barrels); DAVID GOODSTEIN, OUT OF GAS: THE END OF THE AGE OF OIL 15-19 (2004); RICHARD HEINBERG, POWER DOWN: OPTIONS AND ACTIONS FOR A POST-CARBON WORLD 17-54 (2004).

142. KUSHNER, HEALTHY CITIES, *supra* note 97.



# REFLECTIONS ON THE PAST, LOOKING TO THE FUTURE: THE FAIR HOUSING ACT AT 40

john a. powell\*

## INTRODUCTION

Every ten years, dutiful law review editors across the nation call upon commentators and scholars to reflect upon the state of housing in the United States. Among all of the commemorative scholarship in the area of civil rights, perhaps none can be as somber or dispiriting as the state of fair housing. Although, and perhaps because, housing was “the last major frontier in civil rights,” it has proved the most resistant to change.<sup>1</sup> Although more African Americans in major metropolitan areas have moved to the suburbs than any other time in history, patterns of neighborhood-based residential segregation in our metropolitan areas remain persistent.<sup>2</sup> Research also suggests that the movement to the suburbs has not necessarily been a move to stable communities of opportunity.<sup>3</sup> The reversals have been so stark that some commentators have gone so far as to suggest that integration may be “a nice dream, but not fit for the way people really are.”<sup>4</sup>

Although we typically refer to the Fair Housing Act<sup>5</sup> as the “last plank [of] the civil rights” movement,<sup>6</sup> this assertion implies an orderly, rational progression from domain to domain, eradicating bit-by-bit, piece-by-piece any vestiges of slavery and Jim Crow—a progression that in fact did not occur. The spasm of violence and outrage that preceded—one might say precipitated—the passage of the Fair Housing Act is now well known. If not for the tragic events of April 4, 1968, it is uncertain that the Fair Housing Act would have passed. The Act languished in Congress for years before the assassination of Dr. Martin Luther King, Jr., whose efforts to promote fair housing in the North, particularly in Chicago, symbolized the entrenched and insidious nature of Northern housing

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1. Charles M. Lamb, *Equal Housing Opportunity*, in *IMPLEMENTATION OF CIVIL RIGHTS POLICY 148*, 148 (Charles S. Bullock III & Charles M. Lamb eds., 1984); see SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 3 (2004) (“Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”).

2. Haya El Nasser, *Minorities Reshape Suburbs*, USA TODAY, July 9, 2001, available at <http://www.usatoday.com/news/nation/census/2001-07-09-burbs.htm>.

3. Monifa Thomas, *Suburbs No Guarantee of Opportunity: Affluent Blacks Leaving the City Tend to Cluster in Just a Few Communities, but Many Offer Limited Economic Benefits or Access to Good Schools, Jobs*, CHI. SUN-TIMES, Nov. 15, 2005, at 6.

4. David Brooks, *The End of Integration?*, INT’L HERALD TRIB., July 6, 2007, available at <http://www.iht.com/protected/articles/2007/07/06/opinion/edbrooks.php>.

5. 42 U.S.C. §§ 3601-3619 (2000).

6. CASHIN, *supra* note 1, at 3.

segregation.<sup>7</sup>

Instead, it might just be that despite its measured victories, the Fair Housing Act itself, and the anti-discrimination orientation that it conveys, is part and parcel of the problem. The Act itself was largely symbolic. The law created critical exemptions for single-family dwellings that were not sold using a realtor so long as the seller was not “in the business of selling or renting dwellings” nor advertised in violation of prohibitions in the Act.<sup>8</sup> It also exempted multi-family dwellings consisting of less than four units, the so-called “Mrs. Murphy” exemption.<sup>9</sup> Many of the anemic enforcement provisions were bolstered in the 1988 Amendments by instituting a new administrative enforcement procedure and an improved system that authorized civil actions by private parties.<sup>10</sup> The anti-discrimination orientation of the Fair Housing Act may itself be an impediment to achieving the goal of an integrated society.<sup>11</sup> The orientation of the Act itself may be an obstacle to fulfilling its vision of fair housing. The enforcement mechanisms of the Act, whether when filed through the administrative apparatus or through a civil action, are largely individualistic, anti-discrimination tort approaches. These provisions may increase the freedom of choice for homebuyers, but have not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.

Perhaps the Fair Housing Act is not robust enough to address the contemporary challenges and methods of housing exclusion and discrimination; certainly it is not a panacea to centuries of legally and culturally enforced housing segregation which confined African Americans to extremely isolated “ghettos.” This is not to deny the importance of housing: Lawrence Bobo describes residential segregation as the “‘structural lynchpin’ of American racial inequality.”<sup>12</sup> Housing lies at the very heart of a system of institutional relations that reproduce inequality.<sup>13</sup> Therefore, ensuring fair housing is still the critical strategy to address structural and systematic inequality.<sup>14</sup> Former Nixon Housing and Urban Development (“HUD”) secretary George Romney was one of the first secretaries of HUD to be appointed after the implementation of the Act.<sup>15</sup>

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7. U.S. Dep’t of Hous. & Urban Dev., History of Fair Housing, <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm> (last visited May 18, 2008).

8. 42 U.S.C. §§ 3603(b)(1), 3604(c) (2000).

9. *Id.* § 3603(b)(2).

10. For a comprehensive discussion of the 1988 Amendments, see Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

11. See Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1647 (2007).

12. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 33 (1995).

13. John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING AND COMMUNITY DEV. L. 188, 195-201 (2003).

14. *Id.* at 188-90.

15. Christopher Bonastia, *The Unintended Lessons Mitt Romney (and the Rest of Us) Could*

Romney's statements and early policy positions reflected his understanding of the importance of integration in addressing the nation's civil rights challenges.<sup>16</sup> As Romney stated, "The most explosive threat to our nation is the confrontation between the poor and the minority groups who are concentrated in the central cities, and the middle income and affluent who live in the surrounding and separate communities. This confrontation is divisive. It is explosive. It must be resolved."<sup>17</sup> Romney felt that the tremendous resources of the federal government could be utilized to coerce local communities to enforce the Act and embrace integrated housing.<sup>18</sup> This is a strategy still supported by fair housing experts and integration advocates to produce regional fair housing enforcement and true residential integration.<sup>19</sup> Unfortunately, despite the potential for the federal government to play a strong hand in producing residential integration, actions by the Nixon administration continually stifled Romney's ambitions to use the Act to produce integration.<sup>20</sup>

Forty years after the passage of the Fair Housing Act, we reflect upon the successes and failures of the Fair Housing Act and posit that the Act must be reinvigorated to address present and future housing challenges. Part I of this Article summarizes how the Act has produced great changes and how it has fallen short in providing fair housing and integration. A combination of structural impediments have limited the utility of the Act in many metropolitan areas, as school segregation and localized exclusionary housing policy have prevented fair housing gains. Part II discusses the need to reform our federal fair housing priorities by understanding new challenges and priorities in fair housing. Our metropolitan areas are constantly evolving and the Fair Housing Act must recognize these changes, primarily the resurgence of some inner city areas and the decline of older suburbs. The Low Income Housing Tax Credit ("LIHTC") program has taken over as the dominant federally subsidized housing program in the nation, and the federal government must assure that the LIHTC program is fully embracing the principles of fair housing. Part III highlights one of the most recent challenges; the sub-prime lending and foreclosure crisis. The foreclosure crisis gripping many metropolitan areas threatens to undermine many of the homeownership and fair housing gains in our nation.<sup>21</sup> The Fair Housing Act

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*Learn from George Romney*, HIST. NEWS NETWORK, Sept. 25, 2006, <http://hnn.us/articles/29900.html> [hereinafter Bonastia, *The Unintended Lessons*].

16. *Id.*

17. *Id.*

18. *Id.*; see also CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 3 (2006) [hereinafter BONASTIA, KNOCKING ON THE DOOR].

19. John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1574 (1993).

20. See BONASTIA, KNOCKING ON THE DOOR, *supra* note 18.

21. See ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., SUBPRIME LOCATIONS: PATTERNS OF GEOGRAPHIC DISPARITY IN SUBPRIME LENDING 1 (2006), <http://www.consumerfed.org/pdfs/SubprimeLocationsStudy090506.pdf>.

needs to be directed toward addressing this crisis and assuring that predatory lending patterns do not endanger minority homeownership and communities of color in the future.

### I. HAVE WE ACHIEVED FAIR HOUSING?

Forty years after the Fair Housing Act, has our nation solved its fair housing challenges? A review of data suggests some success, but certainly not full victory. Legalized, racially *explicit* barriers to fair housing have been successfully curtailed, and some success in integration has occurred. Despite this success, many persistent, putatively “race-neutral” structures and practices have impeded progress, upholding the damaging segregation and discrimination facing people of color.<sup>22</sup> A review of the research and data related to segregation and integration indicate some gains, but continuing problems. In addition, there remain significant enforcement barriers that prevent the realization of the fair housing provisions.

#### A. *Race, Segregation, Concentrated Poverty, and the “American Dream”*

One positive gain since the Civil Rights movement is the significant growth in homeownership among people of color. In 1950, approximately one out of three African Americans owned their own homes;<sup>23</sup> by 2000, almost one out of two African Americans had achieved the “American Dream” of homeownership.<sup>24</sup> Despite these gains, significant disparities continue to persist between white and black homeownership rates. In 2000, the African American homeownership rate was 65% lower than the white homeownership rate.<sup>25</sup>

Although homeownership rates have increased for people of color, residential segregation rates remain high.<sup>26</sup> African Americans remain the most racially segregated population in the nation, in reference to whites. Despite very modest improvements in recent decades, racial residential segregation remains severe in most metropolitan regions in the United States. Nationally, the average metropolitan region had a dissimilarity index score for African Americans and whites of .65 in 2000.<sup>27</sup> This means that 65% of the metropolitan African-

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22. See generally Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

23. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1955, at 782 (1955), available at <http://www2.census.gov/prod2/statcomp/documents/1955-01.pdf>.

24. U.S. CENSUS BUREAU, CENSUS BUREAU ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 8 tbl. 7 (2008), available at <http://www.census.gov/hhes/www/housing/hvs/qtr108/q108press.pdf>.

25. *Id.*

26. The following discussion of segregation trends is extracted from my remedial expert report in the *Thompson v. HUD* litigation. See Remedial Phase Expert Report of John A. Powell, J.D., *Thompson v. HUD*, 348 F. Supp. 398 (D. Md. 2005) (No. CIV.A.MJG-95-309), 2005 WL 4979114.

27. CASHIN, *supra* note 1, at 88.

American population would have to relocate in order for them to become fully integrated in our metropolitan regions.<sup>28</sup>

In most metropolitan regions today, few truly integrated communities can be found.<sup>29</sup> In regions with large African-American populations, segregation is even more extreme.<sup>30</sup> Residential segregation (as measured by the dissimilarity index) declined by more than twelve points between 1980 and 2000 in regions that were less than 5% African American, but this decline was only six points in regions that were more than 20% African American.<sup>31</sup>

Further, the positive effect of homeownership is contingent upon where one's home is located. One's neighborhood is critical to determining social and economic access to opportunity: housing location, not the house per se, has major implications for employment, education, democratic participation, transportation, and childcare.<sup>32</sup> Neighborhoods of concentrated poverty offer few such high quality amenities, and they often disproportionately house minorities.<sup>33</sup> In 2000, nearly three out of four people living in neighborhoods of concentrated poverty were black or Latino.<sup>34</sup> Concentrated poverty neighborhoods are communities where more than 40% of the population lived in poverty.<sup>35</sup> Analysis of census data for 1999 in metropolitan areas finds nearly one out of ten African Americans living in concentrated poverty neighborhoods.<sup>36</sup> Only one out of 100 whites were found living in concentrated poverty communities.<sup>37</sup> These facts, when viewed with the themes examined herein, further suggest that many of the policies implemented to improve integration have not achieved their desired effects.

### *B. The New Suburbs—Retiring the City-Suburb Dichotomy*

A theme that has been emerging in the demographic profile of many major metropolitan areas in the United States suggests that we must retire some of our traditional views on city-suburban disparities. There is no longer a clear

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28. *Id.*; EDWARD L. GLAESER & JACOB L. VIGDOR, BROOKINGS INST., RACIAL SEGREGATION IN THE 2000 CENSUS: PROMISING NEWS 5 (2001), [http://www.brookings.edu/~/media/Files/rc/reports/2001/04demographics\\_edward%20l%20glaeser%20and%20jacob%20l%20vigdor/glaeser.pdf](http://www.brookings.edu/~/media/Files/rc/reports/2001/04demographics_edward%20l%20glaeser%20and%20jacob%20l%20vigdor/glaeser.pdf).

29. CASHIN, *supra* note 1, at 42.

30. *Id.* at 89.

31. JOHN LOGAN, LEWIS MUMFORD CTR. ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND <http://mumford1.dyndns.org/cen2000/wholepop/wpreport/page1.html>.

32. powell, *supra* note 13, at 197-201.

33. PAUL A. JARGOWSKY, BROOKINGS INST., STUNNING PROGRESS, HIDDEN PROBLEMS: THE DRAMATIC DECLINE OF CONCENTRATED POVERTY IN THE 1990S, at 2, <http://www.brookings.edu/~/media/Files/rc/reports/2003/05demographics-jargowsky/jargowskypoverty.pdf>.

34. *Id.* at 4 fig. 2.

35. *Id.* at 3; *see* U.S. CENSUS BUREAU, AREAS WITH CONCENTRATED POVERTY: 1999, at 1 (2005), <http://www.census.gov/prod/2005pubs/censr-16.pdf>.

36. JARGOWSKY, *supra* note 33, at 8 fig.3.

37. *Id.*

suburban-high opportunity/central city-low opportunity demarcation.<sup>38</sup> The suburbs themselves are segregating into the “favored quarter” suburbs and poorer, resource constrained suburbs.<sup>39</sup> Increasingly, inner-ring or “first” suburbs are taking on the characteristics of their central city neighbors.<sup>40</sup> Between 1999 and 2005, in the nation’s 100 largest metro areas (which encompass two-thirds of the U.S. population), poverty rates rose, and “52[%] of metro[] residents living below the poverty line were found in [the] suburbs.”<sup>41</sup> This is the first time in modern history that more poor people are in the suburbs than the city.<sup>42</sup> People (particularly new immigrants), jobs, and municipal distress are all suburbanizing.<sup>43</sup> As a result, a suburban address does not necessarily indicate a neighborhood of “high opportunity,” which casts doubt on the rosy glow of statistics indicating the increasing suburbanization of minorities.<sup>44</sup> With increasing minority and immigrant populations, first suburbs will grapple with the strain of providing for the increased demands placed on school and healthcare systems.<sup>45</sup> Small municipalities may not be able to effectively handle high demands for infrastructure maintenance, public transportation, and social service provision.<sup>46</sup> In addition, “first suburbs are caught in a policy blind spot between the benefaction long directed toward central cities for problems like housing and economic investment and the new attention . . . on fast-growing outer suburbs.”<sup>47</sup>

The expectation for a high-quality residential experience in the suburbs is not realized in the actual experiences of most minority groups, and studies show that race and ethnicity are in fact better indicators of neighborhood quality.<sup>48</sup> Studies suggest that in fact, stratification may be greater within the suburbs than the

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38. *Economic Opportunity and Poverty in America: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways & Means*, 110th Cong. (2007) (statement of Alan Beurbe, Fellow, Metropolitan Policy Program, Brookings Institution), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5452> [hereinafter *Subcomm. on Income Security and Family Support*].

39. *Id.*

40. *Id.*

41. *Id.*; see also JARGOWSKY, *supra* note 33. The report finds that although the number of people living in concentrated poverty has declined, as has the number of concentrated poverty neighborhoods (“stunning progress”), there was a rise in poverty in the older/inner-ring suburbs (“hidden problems”). *Id.*

42. *Subcomm. on Income Security and Family Support*, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. BRUCE KATZ & ROBERT PUENTES, BROOKINGS INST., AFFLUENT, BUT NEEDY (FIRST SUBURBS) (2006), available at [http://www.brookings.edu/opinions/2006/0212metropolitancity\\_katz.aspx](http://www.brookings.edu/opinions/2006/0212metropolitancity_katz.aspx).

47. *Id.*

48. Samantha Friedman & Emily Rosenbaum, *Does Suburban Residence Mean Better Neighborhood Conditions for All Households? Assessing the Influence of Nativity Status and Race/Ethnicity*, 36 SOC. SCI. RES. 1, 22-23 (2007).

central city, given the presence and power of the majority-group protecting their interests as they pertain to wealth.<sup>49</sup> A recent study by Mary Fischer shows that metropolitan level segregation declines are largely due to steep declines in city segregation; suburban segregation has much lower average declines.<sup>50</sup> In fact, there are regional differences in the preponderance of within-city, between city and suburb, and within-suburb segregation. Segregation between blacks and other groups occurs more often across city lines in the Midwest and Northeast; it is largely due to within-suburb segregation in the West; and in the South, within-city segregation and within-suburb segregation contribute equally to the overall metropolitan segregation level.<sup>51</sup> These instances are compounded by the structural discrimination minorities frequently encounter in both the housing and rental markets, in city and suburb alike, through mechanisms discussed below. Additionally, as social service providers remain in the central city, clients cannot always access them; the smaller, often faith-based providers in the suburbs become more stressed.<sup>52</sup>

On the flip side, as concentrated poverty moves to the suburbs, many cities are experiencing economic revitalization. Recent research indicates that

[w]hile tracts that experienced significant changes in poverty in the 1990s were found in all parts of the metropolitan area, [census] tracts that improved were predominantly located in the inner portions of the central city and the outer rings of the suburbs. In contrast, tracts that worsened were more prevalent in the outer portions of cities and, in particular, the inner ring of the suburbs.<sup>53</sup>

Further, suburban census tracts with higher poverty rates were much more likely to experience high racial demographic change. “[I]t appears that among neighborhoods where poverty worsened notably in the 1990s, the in-migration of lower-income minorities was an important influence.”<sup>54</sup> “Hispanics accounted for the largest share increases in 56[%] of the worsening high-race change tracts, and blacks were the leading group in another 31[%].”<sup>55</sup> Lastly, there is an increasing polarization between high- and low-income neighborhoods. A review

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49. *Id.*

50. Mary J. Fischer, *Shifting Geographies: Examining the Role of Suburbanization in Blacks' Declining Segregation*, 43 URBAN AFF. REV. 475, 490-91 (2008).

51. *Id.* at 491.

52. *Subcomm. on Income Security and Family Support*, *supra* note 38. Berube notes the particular challenges with the suburbanization of poverty: (1) suburban does not necessarily mean “better quality”; (2) social service providers remain in the central city, and people cannot always get to them; the smaller, often faith-based providers in the suburbs are stressed; (3) appropriate housing is scarce. *Id.*

53. G. Thomas Kingsley & Kathryn L.S. Pettit, *Concentrated Poverty: Dynamics of Change*, NEIGHBORHOOD CHANGE IN URB. AM. (Urban Inst., D.C.), Aug. 2007, at 2, available at [http://www.urban.org/uploadedpdf/411527\\_concentrated\\_poverty.pdf](http://www.urban.org/uploadedpdf/411527_concentrated_poverty.pdf).

54. *Id.* at 7.

55. *Id.*

of census data between 1970 and 2000 shows that middle-income neighborhoods are disappearing faster than middle-income households.<sup>56</sup> Indeed, while middle-income “neighborhoods declined from 58[%] in 1970 to 41[%] in 2000,” middle-income households declined at a slower rate, from 28% to 22%, respectively.<sup>57</sup> This trend suggests that minority households may find it increasingly difficult to translate their economic gains to neighborhood quality.<sup>58</sup>

### C. Continuing Impediments to Fair Housing

What explains the mixed results in producing more integrated neighborhoods and fair and open housing? Despite the Fair Housing Act, private acts of racial discrimination against homeowners continue and contribute significantly to segregation.<sup>59</sup> “[H]ousing market discrimination may affect segregation through several mechanisms: price discrimination, exclusion, steering, and by altering the perceived desirability of particular neighborhoods.”<sup>60</sup> In addition to direct discriminatory action by the housing industry, a number of structural impediments and localism have stifled fair housing goals. Exclusionary zoning and localism, combined with a lack of federal support and court support for metropolitan school desegregation have doomed the prospects of integrated metropolitan regions.

### D. Steering and Discrimination

Realtors can engage in steering in three ways: inspecting homes with clients, recommending homes to clients from the Multiple Listing Service, and editorializing, which is to “provide gratuitous positive or negative evaluations . . . about certain areas” the clients are considering.<sup>61</sup> Editorializing appears to be the most prevalent sort of black/white steering mechanism.<sup>62</sup> “[I]n at least 12 to 15% of the [audit] cases, agents systematically provide gratuitous geographic commentary that provides more information to white homebuyers and encourages

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56. JASON C. BOOZA ET AL., BROOKINGS INST., WHERE DID THEY GO? THE DECLINE OF MIDDLE INCOME NEIGHBORHOODS IN METROPOLITAN AMERICA 1 (2006), [http://www.brookings.edu/~/media/Files/rc/reports/2006/06poverty\\_booza/20060622\\_middleclass.pdf](http://www.brookings.edu/~/media/Files/rc/reports/2006/06poverty_booza/20060622_middleclass.pdf).

57. *Id.*

58. *See id.*

59. *See* John Yinger, *Housing Discrimination Is Still Worth Worrying About*, 9 HOUSING POL’Y DEBATE 893, 920 (1998); *see also* NAT’L FAIR HOUS. ALLIANCE, THE CRISIS OF HOUSING SEGREGATION 3-4 (2007), [www.nationalfairhousing.org](http://www.nationalfairhousing.org) [hereinafter THE CRISIS OF HOUSING SEGREGATION] (follow “Fair Housing Resources” then “NFHA Trend Reports”).

60. Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004); *see also* George Galster, *Residential Segregation in American Cities: A Contrary Review*, 7 POPULATION RES. & POL’Y REV. 93 (1988).

61. George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLANN. ASS’N 251, 253 (2005).

62. *Id.* at 258.

them to choose areas with more [w]hite and fewer poor households.”<sup>63</sup> Although the impact may be great, the illegality of this sort of steering is very difficult to detect. Discrimination may be so intertwined with individual preference “that they cloud the determination of a clear legal standard.”<sup>64</sup> In the case of black, middle-class homebuyers, the issue is even more complicated. At least some portion of black residents in such communities may admit to choosing an area based on its composition.<sup>65</sup> If discrimination was involved in the editorializing process, it may also be very difficult to identify. Unless there is a testing process, a potential homebuyer may never become aware of the discrimination.<sup>66</sup> Unfortunately, “steering does not appear to have decreased since tougher fair housing laws were introduced in 1988. . . . [In fact], the incidence of Black/White segregation steering appears to have increased.”<sup>67</sup> Editorializing only to whites regarding school quality flies in the face of actual homebuyer concerns. Black and white homebuyers are equally concerned about affordability, school quality, proximity to work, crime, and quality of public services in their prospective new neighborhoods.<sup>68</sup>

Another obstacle to redressing this sort of behavior may be a muddy legal standard. In *Village of Bellwood v. Dwivedi*,<sup>69</sup> Judge Richard Posner held that consumer preference for a particular racial composition in a neighborhood is a justifiable reason for an agent to steer on the basis of race.<sup>70</sup> Since the decision, HUD has attempted to clarify the role of consumer racial preferences, but with little success in preventing this type of steering.<sup>71</sup>

Another significant recent finding is that on average for African Americans, the higher your income, the less racially segregated you are.<sup>72</sup> However, high-earning African Americans are more segregated from equally high-earning whites than they are from poorer whites.<sup>73</sup> In other words, high-income whites are still segregating themselves from high-income African Americans. Other studies note that “steering and outright exclusion from suburban areas appear to have become

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63. *Id.* at 260.

64. Larkin, *supra* note 11, at 1642.

65. *Id.*

66. Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 892 (1988) (“[W]hen a black [homebuyer] is the victim of discriminatory treatment, he or she is likely to not even know it.”).

67. Galster & Godfrey, *supra* note 61, at 260.

68. GREGORY D. SQUIRES ET AL., HOUSING SEGREGATION IN THE UNITED STATES: DOES RACE MATTER? 13 (2001), [http://www.lincolninst.edu/pubs/dl/616\\_squires\\_friedman\\_saidat.pdf](http://www.lincolninst.edu/pubs/dl/616_squires_friedman_saidat.pdf).

69. 895 F.2d 1521 (7th Cir. 1990).

70. *Id.* at 1531.

71. Larkin, *supra* note 11, at 1645.

72. See JOHN ICELAND ET AL., U.S. CENSUS BUREAU, CLASS DIFFERENCES IN AFRICAN AMERICAN RESIDENTIAL PATTERNS IN U.S. METROPOLITAN AREAS: 1990-2000, at 11 (2003), available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/paa\\_econseg.pdf](http://www.census.gov/hhes/www/housing/housing_patterns/pdf/paa_econseg.pdf).

73. *Id.* at 9.

more important in recent years.”<sup>74</sup>

### *E. Exclusionary Zoning and Localism*

In addition to steering, minorities are often disproportionately excluded from suburban areas through what is known as “exclusionary zoning.”<sup>75</sup> Exclusionary zoning refers to zoning tools that block or slow housing growth in a community, make housing more expensive, or limit rental units.<sup>76</sup> Research has found that “low-density zoning reduces rental housing,” which in turn “limits the number of [b]lack and Hispanic residents.”<sup>77</sup> “Building permit caps are also associated with lowered proportions of Hispanic residents.”<sup>78</sup> Further, despite the fact that the suburbs nationally have gained minorities, minority representations fell in jurisdictions with low-density zoning.<sup>79</sup> Due to the social and physical history of this country’s urban growth patterns, “[j]urisdictions with low-density-only zoning are disproportionately located in a few areas: Boston, New York, Philadelphia, Pittsburgh, and Cleveland.”<sup>80</sup>

Legal scholars have been arguing for over a decade that the “democratic process” that produces and legitimates exclusionary zoning is questionable: as Richard Thompson Ford noted over a decade ago, “the only significant vote that will be taken on the exclusionary ordinance is the first vote. After it is enacted, exclusionary zoning has a self-perpetuating quality.”<sup>81</sup> Unfortunately, the Supreme Court allows suburbs “to use exclusionary zoning . . . that have demonstrable racial effects, absent clear evidence of overt race-based animus.”<sup>82</sup> In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>83</sup> the Court affirmed this view when it ruled that a finding of a racially discriminatory effect was irrelevant for purposes of an Equal Protection Clause challenge.<sup>84</sup>

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74. Dawkins, *supra* note 60, at 396.

75. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLANN. ASS’N 125, 125 (2000).

76. *Id.* at 125-26.

77. *Id.* at 126.

78. *Id.*

79. *Id.* at 132.

80. *Id.* at 138.

81. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1871 (1994) (Ford terms this “tautology of community self-definition.”).

82. John A. Powell & Kathleen M. Graham, *Urban Fragmentation as a Barrier to Equal Opportunity*, in *RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM* 79, 85 (Diane M. Piche et al. eds., 2002).

83. 429 U.S. 252 (1977).

84. *Id.* at 264-66.

#### *F. Segregated Schools and Segregated Neighborhoods*

The impact of school desegregation policy and trends on residential segregation cannot be overlooked. Court enforced efforts to produce integrated schools primarily focused on urban school districts, ignoring suburban schools. The Supreme Court's 1974 *Milliken v. Bradley*<sup>85</sup> decision effectively barred the enforcement of metropolitan school desegregation while supporting localism, leaving inner city districts to face the burden of desegregating while suburban municipalities were allowed to remain exclusive and segregated.<sup>86</sup> With no barriers to white flight and segregated classrooms in the suburbs, central cities (and urban schools) quickly segregated as whites fled urban areas.

#### *G. Orientation of the Act's Enforcement*

The anti-discrimination orientation of the Fair Housing Act may itself be an impediment to achieving the goal of an integrated society.<sup>87</sup> The focus on anti-discrimination normative measures has served to increase the freedom of choice for homebuyers, but it has not necessarily helped produce integrated neighborhoods or addressed segregated living patterns. The protection of private consumer choice in many instances subverts the goal of promoting integration by insulating white and black enclaves. Because of the long exclusion of African Americans from many affluent neighborhoods, the cultural understanding of residential integration has often been translated into depressed property values and criminal activity.<sup>88</sup> Once the proportion of African Americans in a neighborhood reaches a certain threshold, whites tend to leave the neighborhood.<sup>89</sup>

From the perspective of litigating an Equal Protection challenge against a discriminatory law or official action, establishing discrimination can be a nearly insurmountable difficulty in the absence of a "smoking gun." If a discriminatory zoning decision, for example, is made at a city council meeting where residents made explicitly racist comments, the decision is still presumed to be non-racist, unless plaintiffs could prove discriminatory intent on the part of the council members.<sup>90</sup> The sole intent of the city council may well have been to stabilize property values, and as such, with the intent of excluding poor residents from the community, they deliberately choose not to rezone the property. Even if the council likely associated poverty with blacks, such a predictable adverse outcome on a racial group is, by itself, insufficient under U.S. law to establish a claim of racial discrimination in an Equal Protection Clause challenge.<sup>91</sup>

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85. 418 U.S. 717 (1974).

86. *See id.*

87. Larkin, *supra* note 11, at 1647.

88. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 115-85 (1993).

89. This phenomenon is known as tipping. *See, e.g.*, Larkin, *supra* note 11, at 1632-33.

90. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977).

91. Given the amount of confusion among the circuit courts of appeal regarding the role of

The Justice Department (“DOJ”) as an actor is in the best position to address the problem of housing discrimination by bringing “pattern or practice claims.” Unfortunately, the DOJ brings relatively few cases based on the results of testing. In 1999 and 2000, the DOJ brought fifteen cases based on the results of its testing program.<sup>92</sup> From 2001 through 2006, it has only filed sixteen such suits.<sup>93</sup> In 2006 alone, the DOJ only brought thirty-one housing and civil enforcement cases, of which a mere eight involved racial discrimination claims.<sup>94</sup> In 1994, 194 such claims were brought.<sup>95</sup> These numbers need to be considered in light of the fact that HUD estimates over 3.7 million fair housing violations involving race occur annually.<sup>96</sup>

## II. LOOKING TOWARD THE FUTURE: REFORMING OUR FEDERAL FAIR HOUSING PRIORITIES

Given the limitations of the Fair Housing Act in producing greater integration in its forty year history, how can we reinvigorate the Act to counter existing impediments and future challenges? I believe three major modifications to the enforcement of the Fair Housing Act would make a significant difference in producing a true open housing market and more integrated communities in the future. First, fair housing must accept the changing nature of our metropolitan regions, accepting that any simple city-suburban dichotomy must be retired. A new and explicit “opportunity based” view on fair housing must be incorporated into our fair housing principles and actions. Second, the role of the LIHTC program must be brought to the forefront of evaluating the effectiveness of the federal government to “affirmatively further fair housing.” Finally, the Fair Housing Act must be aggressively applied to prevent predatory lending. The on-going sub-prime lending fiasco and the foreclosure fallout produced by predatory lending behavior threaten to severely undermine the gains in homeownership since the Fair Housing Act’s inception.

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intent and its use in challenging a Title VIII (Fair Housing Act) action, evidence of this type of predictable adverse outcome may likewise not be sufficient to sustain a Title VIII violation claim. *See Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1116-17 (D.D.C. 1987) (commenting on the differing approaches of the use of intent, used as a factor of analysis in some circuits and a requirement in others; the court significantly noted that a great deal of confusion remained because various federal courts—and sometimes the same courts—have stated their circuit’s intent rule in different and sometimes irreconcilable ways).

92. *Civil Rights Division Oversight: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights), available at [http://judiciary.senate.gov/testimony.cfm?id=2837&wit\\_id=6546](http://judiciary.senate.gov/testimony.cfm?id=2837&wit_id=6546).

93. *Id.*

94. *Id.*

95. *Id.*

96. THE CRISIS OF HOUSING SEGREGATION, *supra* note 59, at 26.

#### A. New Challenges—The Twenty-first Century Metropolitan Geography of Opportunity

As noted in the discussion above, the geography of race, poverty, and neighborhoods of opportunity is shifting in our metropolitan areas. Racial populations are suburbanizing and the perception of the suburbs as “lily white” is changing.<sup>97</sup> Although suburbanization has expanded the spatial distribution of people of color, research suggests that the suburbs are becoming more polarized and a move to the suburbs does not necessarily result in a move to a healthy community of opportunity. George Galster and The Brookings Institution have found a decline in our nation’s middle-class neighborhoods, as more communities are polarizing into poor or wealthy neighborhoods.<sup>98</sup> More impoverished residents are living in the suburbs than in our central cities.<sup>99</sup> Research by Myron Orfield at the Institute of Race and Poverty has shown that minority populations are more likely to move to “at risk” suburban neighborhoods.<sup>100</sup> In *The Failures of Integration*, Sheryll Cashin demonstrates that even the wealthiest African-American suburban community in the nation (Prince George’s County, MD) does not have access to the opportunities available in predominately white suburbs in the Washington, D.C. region.<sup>101</sup> Our urban communities are changing as well, with redevelopment, in migration and investment occurring in many core urban neighborhoods throughout the United States. Even distressed Rust-Belt cities such as Detroit have small pockets of revitalization and reinvestment.

Our fair housing policies and programs must accept and understand the new dynamics of opportunity in our metropolitan areas. Affordable housing policy must be directed to affirmatively connect affordable housing to neighborhoods of opportunity, whether they are in a revitalized inner city or in an affluent suburb.<sup>102</sup> An assessment of the social, economic, educational, and environmental health of all neighborhoods must be conducted at a metropolitan or regional scale to guide this informed decision making.<sup>103</sup> Mapping neighborhoods of opportunity throughout a metropolitan area can guide affordable housing policy to assure that people of color and other low-income

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97. See generally WILLIAM H. FREY, BROOKINGS INST., MELTING POT SUBURBS: A CENSUS 2000 STUDY OF SUBURBAN DIVERSITY (2001).

98. BOOZA ET AL., *supra* note 56, at 9-12.

99. *Subcomm. on Income Security and Family Support*, *supra* note 38.

100. INST. ON RACE & POVERTY, MINORITY SUBURBANIZATION, STABLE INTEGRATION, AND ECONOMIC OPPORTUNITY IN FIFTEEN METROPOLITAN REGIONS 4, [http://www.irpumn.org/uls/resources/projects/Minority\\_Suburbanization\\_full\\_report\\_032406.pdf](http://www.irpumn.org/uls/resources/projects/Minority_Suburbanization_full_report_032406.pdf). “At Risk” suburbs are defined as fiscally stressed suburbs with below average public resources and above average public resource needs. *See id.*

101. CASHIN, *supra* note 1, at 127-60.

102. *See* powell, *supra* note 13, at 188-90.

103. *Id.* at 203-05.

households have true access to opportunity.<sup>104</sup> This strategy is already in use in an on-going fair housing case in the U.S. District Court of Maryland. The plaintiffs in *Thompson v. HUD*<sup>105</sup> have adopted and proposed an opportunity-based remedial proposal to address HUD's fair housing violation in Baltimore. The remedial proposal from the plaintiffs recommends 7000 new housing opportunities be placed in high opportunity communities in the Baltimore region.<sup>106</sup>

### *B. New Challenges—Applying Fair Housing Criteria to the LIHTC Program*

Reinvigorating the Fair Housing Act also requires refocusing our attention on the primary production program for subsidized housing in the nation, the LIHTC.<sup>107</sup> LIHTC “is currently the largest federal program to fund the development and rehabilitation of housing for low-income households.”<sup>108</sup> Created by the 1986 Tax Reform Act, LIHTC is administered by the Department of the Treasury through state and local housing credit agencies.<sup>109</sup> The program reflects a major shift from subsidies for construction distributed by HUD or the Department of Agriculture to a tax credit program, with subsidies totaling roughly \$5 billion per year.<sup>110</sup> The LIHTC program has been described “as the de facto new construction program for low- and moderate-income housing.”<sup>111</sup> As of 2003, 1.3 million units were produced by the LIHTC program, (with an estimated 100,000 units “placed in service” each year in recent years<sup>112</sup>) dwarfing

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104. JOHN A. POWELL ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL 11 (2007), <http://kirwan.gripserver3.com/publicationspresentations/publications/index.php> (follow “Communities of Opportunity: A Framework for a More Equitable and Sustainable Future for All” hyperlink for pdf).

105. 348 F. Supp. 2d 398 (D. Md. 2005).

106. For more information, please review the plaintiff's *Thompson* post-trial review brief available on the NAACP Legal Defense Fund website at: [http://www.naacpldf.org/content/pdf/thompson/THOMPSON\\_Post\\_Trial\\_Brief.pdf](http://www.naacpldf.org/content/pdf/thompson/THOMPSON_Post_Trial_Brief.pdf).

107. 26 U.S.C. § 42 (2000).

108. Roisman, *supra* note 22, at 1011-12.

109. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252(a), 100 Stat. 2085, 2189-208 (codified as amended at 26 U.S.C. § 42 (2000)).

110. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Tax Credit*, 58 VAND. L. REV. 1747, 1779 (2005).

111. LANCE FREEMAN, BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990s, at 3 (2004), [http://www.brookings.edu/urban/pubs/20040405\\_Freeman.pdf](http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf). “[T]he tax credit subsidy alone reduces rents only to a moderate level”; and because LIHTC units serve a range of affordable-housing needs, only about 1/3 (31%) of LIHTC residents are Section 8. Roisman, *supra* note 22, at 1015-16.

112. JILL KHADDURI ET AL., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED

HUD production programs, which produced about 50,000 units total in the 1990s.<sup>113</sup>

While the LIHTC program has taken prominence as the preeminent affordable housing program in the nation, many fair housing advocates have grown concerned the program is not affirmatively furthering fair housing, despite its potential to do so. For example, a decade ago, Professor Florence Wagman Roisman argued that the program was actually producing “separate and unequal housing.”<sup>114</sup> For example, a 1989 amendment provides an incentive (a 30% density increase) for “any building located in a qualified census tract or difficult development area.”<sup>115</sup> This amendment has highlighted concern from legal and policy activists that LIHTC, while ostensibly race-neutral, is segregating, or re-segregating, low-income families, particularly minority families, from opportunity-rich neighborhoods.<sup>116</sup>

Recent research on LIHTC siting supports the concern that the program is concentrating units in lower-income, segregated areas. Reviewing data on LIHTC units (with two or more bedrooms) placed in service in large metropolitan areas between 1995 and 2003, researchers found that only 22% of these units were in low-poverty neighborhoods (less than 10% poverty rate).<sup>117</sup> Across all metropolitan units, low-poverty and higher-poverty census tracts have similar percentages of two-bedroom units; that is, there is not a tendency to locate family housing in higher-poverty neighborhoods and one-bedroom units in lower-poverty neighborhoods, although this may be true within individual metropolitan areas.<sup>118</sup> However, there is tremendous variation by state. A state-by-state review found that “Utah, New Hampshire, New York, Wisconsin, Delaware, Nebraska, and Colorado” “have made the greatest efforts to provide opportunities for families with children to live in low poverty neighborhoods.”<sup>119</sup> “In contrast,” the researchers note, “Illinois, South Carolina, Kentucky, Pennsylvania, Connecticut, Massachusetts, Idaho, Arizona, and the District of Columbia place small fractions of their LIHTC family housing in census tracts in which fewer than 10[%] of all people are poor.”<sup>120</sup> States do worse on offering racially integrative opportunities with LIHTC units than they do offering socioeconomic integration: “Quite a few states place less than a quarter of their LIHTC family housing in large metropolitan areas in census tracts with less than the average minority population rate for the metropolitan area.”<sup>121</sup> We do not know who is occupying the units in low-poverty, low-minority neighborhoods because current

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NEIGHBORHOODS? (2006).

113. FREEMAN, *supra* note 111, at 4.

114. Roisman, *supra* note 22, at 1020.

115. *Id.* at 1018 (quoting 26 U.S.C. § 42(d)(5)(C)(i)(I) (2000)).

116. *Id.* at 1020-22.

117. KHADDURI ET AL., *supra* note 112, at 7.

118. *Id.* at 8.

119. *Id.* at 22.

120. *Id.*

121. *Id.*

LIHTC program requirements do not include collection of racial and ethnic data on occupants.<sup>122</sup>

Research by Lance Freeman using Census 2000 data found similar conclusions, noting that the LIHTC program is doing better at providing integrative housing units than traditional public housing, but is still disproportionately concentrated in higher-minority, lower-income neighborhoods when compared to the average metropolitan neighborhood.<sup>123</sup> Unless the LIHTC program is more deliberately aligned to providing affordable units in higher opportunity neighborhoods, these challenges will continue. Restrictive zoning, land prices, and Not In My Backyard (“NIMBY”) behavior will continue to provide impediments to providing LIHTC housing units in neighborhoods of opportunity unless policy is explicitly targeted to support these more integrative housing developments. Several states are already pursuing this goal, adopting LIHTC development criteria to promote development in lower-poverty, higher-opportunity areas.<sup>124</sup>

### III. ADDRESSING THE LENDING AND FORECLOSURE CRISIS

An alarming new phenomenon is shaking the entire housing market and threatens to unravel the successes in homeownership for communities of color. One of the top items in the news and making national headlines is the increased foreclosure rates due to subprime lending practices that comprised 20% of the mortgage market in 2005, up from 5% in 1994.<sup>125</sup> An estimated two million foreclosures are expected in the next two years.<sup>126</sup> If current trends continue, a disproportionate share of these foreclosures will occur in urban communities of color.<sup>127</sup> In 2006, 52.44% of African Americans received loans that were subprime, compared to 22.2% of white non-Hispanic families.<sup>128</sup>

Recent statistics show that in the United States, we have achieved record levels (69%) of homeownership.<sup>129</sup> This growth in homeownership rates

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122. *Id.*; FREEMAN, *supra* note 111, at 11.

123. FREEMAN, *supra* note 111, at 6-8.

124. ALANNA BUCHANAN ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM 18-20, 27-28 (2006), <http://www.prrac.org/pdf/BuildingOpportunity.pdf>.

125. FISHBEIN & WOODALL, *supra* note 21, at 4.

126. ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 2 (2006), <http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf>.

127. See Vikas Bajaj, *Bad Loans Put Wall St. in a Swoon*, N.Y. TIMES, Mar. 14, 2007, at C6; Juan Gonzalez, *Set Up For A Fall: Subprime Mortgages Lead to Record Foreclosures in the City's Poorest Nabs*, N.Y. DAILY NEWS, Mar. 28, 2007.

128. CTR. FOR RESPONSIBLE LENDING, A SNAPSHOT OF THE SUBPRIME MARKET 2 (2007), <http://www.responsiblelending.org/pdfs/snapshot-of-the-subprime-market.pdf>.

129. Matt A. Barreto et al., *Homeownership: Southern California's New Political Fault Line?*, 42 URB. AFF. REV. 315, 318 (2007). However, a substantial gap—“more than 27%”—still exists

represents a surge in new cohorts of homeowners, including female-headed families, young people, minorities, and immigrants.<sup>130</sup> Unfortunately, this growth is characterized by a dual mortgage delivery system: “government-backed loans and lending by subprime and manufactured housing specialists account for almost two-thirds of recent [homeownership] increases in low-income neighborhoods,” whereas conventional prime lending represents “81[%] of the loans to higher-income borrowers in higher-income neighborhoods.”<sup>131</sup> Homeownership gains are made even more tenuous by the fact that only 9% of subprime loans between 1998 and 2006 were to first-time home buyers (representing homeownership gains), yet 15.6% of all subprime loans resulted in (or are expected to result in) almost one million homes lost due to foreclosures since 1998.<sup>132</sup> These figures represent a *net loss* in each year for the past nine years in the subprime market.<sup>133</sup>

Subprime lenders extended mortgages to perceived high risk creditors;<sup>134</sup> however, research by the Center for Responsible Lending shows that these mortgages were racially discriminatory: “African-American and Latino borrowers are at greater risk of receiving higher-rate loans than white borrowers,

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between rates of white homeownership and those of African Americans and Latinos. *Id.*

130. *Id.*

131. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2002, at 1 (2002), <http://www.jchs.harvard.edu/publications/markets/son2002.pdf>.

132. CTR. FOR RESPONSIBLE LENDING, SUBPRIME LENDING: A NET DRAIN ON HOMEOWNERSHIP 3-4 (2007), <http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf>.

133. *Id.*

134. Federal Reserve Chairman Ben Bernanke explained:

Subprime mortgages are loans intended for borrowers who are perceived to have high credit risk. Although these mortgages emerged on the financial landscape more than two decades ago, they did not begin to expand significantly until the mid-1990s. The expansion was fueled by innovations—including the development of credit scoring—that made it easier for lenders to assess and price risks. In addition, regulatory changes and the ongoing growth of the secondary mortgage market increased the ability of lenders . . . to sell many mortgages to various intermediaries, or “securitizers.” The securitizers in turn pooled large numbers of mortgages and sold the rights to the resulting cash flows to investors, often as components of structured securities. This “originate-to-distribute” model gave lenders (and, thus, mortgage borrowers) greater access to capital markets, lowered transaction costs, and allowed risk to be shared more widely. The resulting increase in the supply of mortgage credit likely contributed to the rise in the homeownership rate from 64[%] in 1994 to about 68[%] now—with minority households and households from lower-income census tracts recording some of the largest gains in percentage terms.

*Subprime Mortgage Lending and Mitigating Foreclosures: Before the H. Comm. on Financial Servs.*, 110th Cong. (2007) (statement of Hon. Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System), available at <http://www.federalreserve.gov/newsevents/testimony/bernanke20070920a.htm> [hereinafter Bernanke Testimony].

even after controlling for legitimate risk factors.”<sup>135</sup> Many subprime borrowers have been swept up in a wave of foreclosures threatening the health of families, neighborhoods,<sup>136</sup> cities,<sup>137</sup> and major financial markets.<sup>138</sup> “Adjustable-rate subprime mortgages [ (“ARMs”)] originated in late 2005 and . . . have performed the worst, with some of them defaulting after only one or two payments” (or none at all).<sup>139</sup> Combined with sharp declines in home prices since 2005, borrowers are left with no home equity or cannot afford to refinance (which would avoid the large interest rate resets).<sup>140</sup> This enormous wave of foreclosures is significant because the housing sector plays a major role in state and local economies, as “[r]esidential investment, housing consumption, and housing-related expenditures together account for nearly one-fifth of GDP.”<sup>141</sup> In fact, over \$1 billion is projected to be lost in local house prices and tax bases each, for twenty-four states and forty-two counties, due to expected foreclosures.<sup>142</sup> Studies estimate that the spillover effects of foreclosures into adjacent neighborhoods will result in decreased property valuations (and depleting tax bases), a near 1% decrease, and these effects are found to be cumulative.<sup>143</sup>

At the same time, those still hanging on to their homes are more likely than ever to have affordability problems. From 1990-2000, affordability problems

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135. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006), [http://www.responsiblelending.org/pdfs/rr011-Unfair\\_Lending-0506.pdf](http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf).

136. For research on the stabilizing effect on communities that homeownership has, see MICHAEL COLLINS, PURSUING THE AMERICAN DREAM: HOME OWNERSHIP AND THE ROLE OF FEDERAL HOUSING POLICY 4 (2002), <http://www.nw.org/network/pubs/studies/documents/pursuingAmDreamCollins2002.pdf>. For an example of the effect on a specific community, see Tim Jones, *Cleveland Rocked by Home Foreclosures*, COLUMBUS DISPATCH, Mar. 23, 2007.

137. See recent complaints filed by cities and their mayors, e.g., Complaint for Declaratory and Injunctive Relief and Damages, Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., No. L08CV 062 (D. Md. Jan. 8, 2008), 2008 WL 117894 [hereinafter Balt. Complaint]; Complaint, City of Cleveland v. Deutsche Bank Trust Co., No. CV-08-646970 (Ohio Ct. Com. Pl. Jan. 10, 2008) [hereinafter Cleveland Complaint].

138. Eric Dash, *Citi to Announce Big Cuts and New Investors*, N.Y. TIMES, Jan. 15, 2008, at C1.

139. Bernanke Testimony, *supra* note 134 (noting that delinquent subprime ARMs have tripled since mid-2005, reaching 15%; in contrast, “less than 1[%] of [prime-mortgage] loans are seriously delinquent”).

140. *Id.*

141. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 131, at 6.

142. CTR. FOR RESPONSIBLE LENDING, *supra* note 128, at 3.

143. That is, for every additional foreclosure, values decreased by almost 1% as well. CTR. FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION; 40.6 MILLION HOMES LOSE \$5,000 ON AVERAGE 1 (2008), <http://www.responsiblelending.org/pdfs/subprime-spillover.pdf>. Decreases were even higher in lower-income neighborhoods, approximately 1.44%. *Id.*

increased by 52%, two-and-a-half times the rate of homeownership increases.<sup>144</sup> Low-income families and minorities are hardest hit by decreasing affordability.<sup>145</sup> Low-income homebuyers also face greater risks in terms of costly home repairs, given that more of their income is dedicated to their mortgage.<sup>146</sup> Lower-income homeowners “with less than 80[%] of area median income levels are more likely to be elderly, disabled, minority, or single parents with children than higher income owners.”<sup>147</sup> “The quality of their housing stock is often poor: inadequacy rates are over twice as high for the units of these owners than for those with higher incomes.”<sup>148</sup>

The foreclosure crisis is not just depleting city and lender coffers. Homeownership is understood to be an important component of “social, economic, . . . psychic,” and financial well-being.<sup>149</sup> Public opinion polls indicate that most renters aspire to be homeowners and that homeownership is a high priority, regardless of one’s demographic status (married, single, with children, etc.).<sup>150</sup> The benefits of homeownership include wealth generation and inter-generational wealth transfer, protection from inflation, increased borrowing power, community involvement, and the like.<sup>151</sup> Unfortunately, these benefits, particularly home equity building and inter-generational wealth transfer, have been unequally distributed by race.<sup>152</sup> For example, for every \$1 in assets held by African Americans, whites hold more than \$10.<sup>153</sup> The median asset value for a white household in 2000 was \$79,400.<sup>154</sup> For African-American households, this was \$7,500 (a disparity of 1059%).<sup>155</sup>

Owning is more than building equity. Tax subsidies to homeowners (wherein homeowners write mortgage interest off of their taxable income) amounted to a \$119.3 billion subsidy nationwide.<sup>156</sup> Additional subsidies include

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144. PATRICK A. SIMMONS, FANNIE MAE FOUND., RISING AFFORDABILITY PROBLEMS AMONG HOMEOWNERS: 1990S HOMEOWNERSHIP BOOM LEAVES A HANGOVER OF OWNERS WITH SEVERE COST BURDENS (2004), [http://www.FannieMaeFoundation.net/programs/pdf/census/notes\\_13.pdf](http://www.FannieMaeFoundation.net/programs/pdf/census/notes_13.pdf).

145. *Id.*

146. Josephine Louise et al., *The Housing Needs of Lower-Income Homeowners* 3 (Joint Ctr. for Hous. Studies Harvard Univ., Working Paper No. W98-8, 1998).

147. *Id.* at 9.

148. *Id.*

149. Barreto et al., *supra* note 129, at 315-16.

150. *Id.* at 317.

151. *Id.*

152. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); see also OLIVER & SHAPIRO, *supra* note 12.

153. SHAWNA ORZECHOWSKI & PETER SEPIELLI, U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, at 2, <http://www.census.gov/prod/2003pubs/p70-88.pdf>.

154. *Id.*

155. *Id.*

156. CUSHING N. DOLBEARE ET AL., NAT’L LOW INCOME HOUS. COAL., CHANGING PRIORITIES: THE FEDERAL BUDGET AND HOUSING ASSISTANCE 1976-2005, at 4 (2004), <http://www>.

write-downs for property depreciation, the use of a home office, interest on home-equity debt, moving expenses, refinancing, and the like.<sup>157</sup> The impending wave of foreclosures set to hit communities of color will increase the wealth gap and place more barriers between people of color and access to the ample financial benefits of homeownership. Early estimates of the asset loss due to the foreclosure and subprime crisis are shocking. A recent study released by United for a Fair Economy estimates the loss of equity to “all subprime borrowers of color” to be nearly a quarter of a trillion dollars.<sup>158</sup> The loss of assets will be due to direct foreclosures and the financial impact in property devaluation in minority neighborhoods where foreclosures (and vacant homes) are concentrated.<sup>159</sup> Even before the subprime crisis, however, researchers noted that “low-income homeowners typically do not benefit from mortgage and property tax deductions because the value of the standard deduction exceeds the value of these itemized deductions to them.”<sup>160</sup> Only 3% of home owners with incomes of under \$20,000 itemized their deductions in 1998; in contrast, 86% of homeowners with incomes above \$75,000 itemized.<sup>161</sup> “And even among low-income homeowners that do itemize,” the value of the mortgage interest deduction is lower because their marginal tax rates are lower.<sup>162</sup>

Action is needed to bring fair housing laws into negating the impacts of the foreclosure crisis. Two cities have already started legal action against major lenders in response to the discriminatory, community-wide impacts of the crisis. In January 2008, the Mayor and City Council of Baltimore filed suit against Wells Fargo for declaratory and injunctive relief and damages with respect to the bank’s lending practices in Baltimore, bringing the complaint in district court pursuant to the Fair Housing Act.<sup>163</sup> The suit alleges that lenders were “[e]nticed by . . . short-term profits resulting from exorbitant organization fees, points, and related pricing schemes.”<sup>164</sup> Lenders offered irresponsible subprime loans to borrowers who could not afford them, with deceptive means and “promises to

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[nlihc.org/doc/cp04.pdf](http://nlihc.org/doc/cp04.pdf).

157. For a full list, see Kiplinger.com, *Deductions for Homeowners*, <http://www.kiplinger.com/features/archives/2007/01/hometaxopedia.html> (last visited May 24, 2008); *see also* Kenneth R. Harney, *Tax Benefits Still Generous for Homeowners, but Biggest Incomes Earn the Biggest Share*, WASH. POST, Feb. 5, 2005, at F1.

158. AMAAD RIVERA ET AL., UNITED FOR FAIR ECON., *FORECLOSED: STATE OF THE DREAM* 2008, [http://www.faireconomy.org/files/StateOfDream\\_01\\_16\\_08\\_Web.pdf](http://www.faireconomy.org/files/StateOfDream_01_16_08_Web.pdf).

159. *Id.* at 26.

160. Eric S. Belsky et al., *The Financial Returns to Low-Income Homeownership* 4 (Joint Ctr. for Hous. Studies Harvard Univ., Working Paper No. W05-9, 2005), <http://www.jchs.harvard.edu/publications/finance/w05-9.pdf>; *see also* Steven C. Bourassa & William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing*, 11 HOUS. POL’Y DEBATE 521, 531 (2000).

161. Bourassa & Grigsby, *supra* note 160, at 532.

162. Belsky et al., *supra* note 160, at 5.

163. Balt. Complaint, *supra* note 137.

164. *Id.* ¶ 25.

refinance at a later date.”<sup>165</sup> Subprime lenders underwrote “loans based only on consideration of whether the borrower [could] make payments during the initial teaser rate period, without regard to the sharply higher payments that [would] be required for the remainder” of the thirty-year loan.<sup>166</sup> Lenders misled borrowers into thinking they could afford the “same low monthly payment for the entire 30-year term of the loan, or that they [could] refinance their loan before the teaser rate period expire[d].”<sup>167</sup> The refinanced loans would charge substantial new fees, often hidden, stripping much of the equity gained.<sup>168</sup> They charged “excessive points and fees that [were] not associated with any increased benefits for the borrower.”<sup>169</sup> In short, the lender would make a quick profit from the loan origination, but set borrowers up for default and foreclosure.

Further, the suit alleges that Baltimore’s African-American neighborhoods were disproportionately impacted by subprime foreclosures.<sup>170</sup> The complaint discusses the practice of “reverse redlining,” or targeting residents in certain geographic areas for credit on unfair terms due to “the racial or ethnic composition of the area.”<sup>171</sup> Unlike redlining, which is denying prime credit to those communities, reverse redlining is targeting an area for “deceptive, predatory, or otherwise unfair lending practices.”<sup>172</sup> “Reverse redlining has repeatedly been held to violate the . . . Fair Housing Act.”<sup>173</sup> In Baltimore, the neighborhoods with 90% African-American populations “are at the center of the foreclosure crisis.”<sup>174</sup> Two-thirds of Wells Fargo’s foreclosures in 2005 to 2006 were in census tracts that were over 60% African-American, but only 15.6% were in tracts that were 20% or less African-American.<sup>175</sup> “[A] Wells Fargo loan in a predominantly African-American neighborhood [was] four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood.”<sup>176</sup> “Wells Fargo made high-cost loans . . . to 65% of its African-American mortgage customers in Baltimore, but only to 16% of its white customers in Baltimore.”<sup>177</sup> Importantly, “an African-American borrower was 2.5 times more likely to be high cost than a refinance loan to a white borrower.”<sup>178</sup>

The plaintiffs are acutely aware of the structural reverberations of the crisis

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165. *Id.*

166. *Id.* ¶ 26(a).

167. *Id.*

168. *Id.* ¶ 26(b).

169. *Id.* ¶ 26(f).

170. *Id.* ¶ 2.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* ¶ 34.

175. *Id.* ¶ 3.

176. *Id.* ¶ 39.

177. *Id.* ¶ 47.

178. *Id.*

beyond those families experiencing the loss of their homes.<sup>179</sup> Foreclosures lead to abandoned and vacant homes.<sup>180</sup> This causes neighborhoods, especially ones already struggling, to decline rapidly by reducing the value of property of nearby homes.<sup>181</sup> A Fannie Mae study in Chicago found that every “foreclosure is responsible for an average decline of approximately 1% in the value of each single-family home within a quarter of a mile.”<sup>182</sup> This in turn results in lost tax revenue from property taxes, which makes it more difficult “for the [c]ity to borrow funds because the value of the property tax base is used to qualify for loans.”<sup>183</sup> In addition, cities lose real estate transfer tax revenues because of the depressed market for home sales.<sup>184</sup> “[T]hese cities must spend additional funds for services related to foreclosures, including the cost of securing vacant homes, [and] holding administrative hearings, . . . conducting other administrative and legal procedures, . . . [and] providing additional police and fire protection as vacant properties become centers of dangerous and illicit activities.”<sup>185</sup> The total estimated costs for the city of Baltimore are about \$34,199 per foreclosure.<sup>186</sup>

Taking another perspective of the impact of the crisis, the City of Cleveland filed suit in the Cuyahoga County Court of Common Pleas against various subprime securitizers (twenty-one defendants in total) on the grounds that their conduct resulted in a public nuisance under Ohio common law.<sup>187</sup> The City is suing the securitizers for damages (the City’s costs for increased services, demolition, etc., and property tax losses and interest).<sup>188</sup> The complaint notes that “[a]n average of [twenty] Cleveland homeowners faced” foreclosures *every day* of the year in 2007<sup>189</sup> and that a Center for Responsible Lending study estimated “that homes in Cuyahoga County collectively depreciated more than \$462 million due to their proximity to foreclosed property.”<sup>190</sup> The City alleges that, given that subprime securitization works only if properties are gaining in value (only if your property appreciates can you afford the higher rates that follow the “teaser” rates), and given that it was generally known that Cleveland’s home values and economy generally were flat, the securitizers should have foreseen that massive foreclosures were the inevitable result of their actions.<sup>191</sup>

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179. *Id.* ¶¶ 65-66.

180. *Id.* ¶ 66(b).

181. *Id.* ¶ 68.

182. *Id.* ¶ 67 (citing Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Hous. Pol'y Debate 57 (2006)).

183. *Id.* ¶ 19.

184. *Id.* ¶ 20.

185. *Id.*

186. *Id.* ¶ 69.

187. Cleveland Complaint, *supra* note 137.

188. *Id.* ¶ 65.

189. *Id.* ¶ 37.

190. *Id.* ¶ 61.

191. *Id.* ¶¶ 4-5 (“Cleveland’s economy and housing situation differed significantly from the

Although the suit makes reference to reverse redlining,<sup>192</sup> the suit does not allege violations of the Fair Housing Act, unlike the Baltimore complaint.

### CONCLUSION

The Fair Housing Act was conceived under a set of conditions very different from the ones we practice in today: a predominately production-oriented subsidized housing market, a clear city-suburban quality-of-life dichotomy, and a simplified mortgage market pre-securitization (and internationalization). The task that lies ahead is to assess the efficacy of fair housing advocacy in a changed era (one of indirect production through tax subsidies), a complex and ever-changing metropolitan geography, and complex global financial markets. A thoughtful fair housing activism and legal practice must engage with these changing conditions and posit new mechanisms for intervention into structures and practices that continue to segregate, by race and income, our communities. The Fair Housing Act was far more than a narrow anti-discrimination measure. The Act targeted false advertising, unfair terms, false representations, and, further, required government actors to affirmatively further fair housing mandates. Addressing our current residential arrangements requires an approach equally bold. Housing remains the linchpin of racial inequality because of its centrality and relationship with major economic, social, and political institutions. Failing to ensure fair housing for all Americans will undoubtedly undermine efforts to promote integration in every other area of American life.

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rest of the country's at the time sub-prime lending reached its peak. The disparities made mass foreclosures the only possible result of flooding the local market with sub-prime mortgages, even if doing likewise in other cities created no such apparent risk.”).

192. *Id.* ¶ 62.



# FORECLOSURES, INTEGRATION, AND THE FUTURE OF THE FAIR HOUSING ACT

JOHN P. RELMAN\*

## INTRODUCTION

In their seminal work, *American Apartheid*, Douglas Massey and Nancy Denton compellingly chronicle the way in which residential spatial segregation in America's cities has contributed to the growth of an African-American underclass that threatens to make urban poverty and racial injustice a permanent fixture of American society.<sup>1</sup> Central to their argument is the evidence that "hypersegregation," or the extreme concentration of poor blacks in inner city neighborhoods, has left many minority communities vulnerable to a socio-economic "downward spiral" at the slightest turn in the economy.<sup>2</sup> Relying on empirical data, Massey and Denton convincingly explain the precise manner in which spatial segregation combines negative social and economic conditions to push poor black neighborhoods beyond the threshold of stability.<sup>3</sup>

As we mark the fortieth anniversary of the passage of the Fair Housing Act ("FHA"),<sup>4</sup> the lesson of Massey and Denton's study could not be more timely. It is beyond argument that four decades after the death of Dr. Martin Luther King, we have yet to achieve anything close to the integrated living patterns that were central to both his dream and the purposes of that historic law.<sup>5</sup> It is equally clear, with the advent of the subprime mortgage foreclosure crisis, that we now face an economic tsunami with the potential to destroy decades of tentative progress in America's inner city black and Hispanic communities. This is true both because of the exacerbating effect of hypersegregation and because of the legacy of discrimination that has left underserved minority communities particularly vulnerable to the predatory practices of subprime lenders and the devastating consequences of foreclosure that follow close on the forced abandonment of countless homes.

Contrary to those who point to the lack of progress in achieving integration

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1. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).
2. See *id.* at 74-78, 118-30.
3. *Id.* at 118-30.
4. 42 U.S.C. § 3601-3619 (2000).
5. See LYNETTE A. RAWLINGS ET AL., URB. INST., *RACE AND RESIDENCE: PROSPECTS FOR STABLE NEIGHBORHOOD INTEGRATION* 2 (2004).

as evidence of a failure of fair housing litigation, the current economic crisis underscores the need to redouble our efforts to use creative litigation strategies to break down barriers to spatial and racial mobility, and shore up transitional minority neighborhoods struggling to hang on in the face of rising foreclosures. This is true because the problems we now face are uniquely suited—perhaps as never before—to a litigation response.

As a general matter, litigation works both as a tool for reform and as a remedy where there is a clearly identifiable pattern of illegal behavior, and the entity responsible for the violation has the means to contribute to the solution. Both of those conditions are met here. The foreclosure crisis has had a disparate effect on black and Latino neighborhoods precisely because of the illegal reverse redlining practices of clearly identifiable financial institutions who targeted these communities as a means to maximize short term profits. Those responsible for undermining the stability of these communities through their predatory lending practices have the means to provide much needed financial assistance to America's cities to help fix the problem.

The FHA is an especially effective legal weapon for attacking this problem. The four requirements for a successful outcome are all present: standing (as broad as Article III will allow);<sup>6</sup> liability (FHA case precedent clearly recognizes both redlining and reverse redlining or “targeting” claims);<sup>7</sup> powerful remedies (unlimited compensatory and punitive damages are both available, to be determined by a jury if desired);<sup>8</sup> and a generous statute of limitations (two years, in addition to a continuing violations theory allowing claims to stretch back indefinitely to cover the full time period of a continuing pattern of illegal conduct).<sup>9</sup>

More importantly, an opportunity has arisen now to harness the FHA in a way that has not been fully utilized before to promote integration. For the first time, America's cities—mayors and their city councils—have begun to recognize the power of the FHA to bring irresponsible financial institutions, the very ones who have profited at the expense of inner city black and Latino communities, to the table to remedy the injury that the *cities* have suffered.

Recently, Baltimore became the first city to bring suit against a major lender for targeting its minority communities for discriminatory lending practices that it alleges have resulted in unnecessarily high rates of foreclosure.<sup>10</sup> These

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6. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (citing *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979)).

7. See, e.g., *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

8. See 42 U.S.C. § 3613(c)(1) (2000) (damages); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (entitlement to jury trial); see also *Preferred Props., Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 802 (6th Cir. 2002) (affirming jury verdict in favor of plaintiff in FHA case).

9. See 42 U.S.C. § 3613(a)(1)(A) (2000) (two-year statute of limitations); *Havens Realty Corp.*, 455 U.S. at 380-81 (applying continuing violation theory).

10. Complaint for Declaratory and Injunctive Relief and Damages ¶ 6, *Mayor & City Council of Balt. v. Wells Fargo Bank, N.A.*, No. L08CV062 (D. Md. Jan. 8, 2008), 2008 WL 117894

foreclosures, it contends, are destroying minority neighborhoods and costing the city millions of dollars in out of pocket costs and damages.<sup>11</sup> One can reasonably assume other cities are now contemplating similar actions.<sup>12</sup> This development is possible because standing under the FHA is uniquely suited to permit cities the ability to sue as an “aggrieved person” in their own right.

This legal development has the power to be truly transformative, not simply in terms of its ability to reform an industry, but in its potential to promote integration through the stabilization of transitional minority neighborhoods. Lowering the barriers to integration requires, in the first instance, stopping the downward socio-economic spiral of hypersegregated communities. The racial mobility that Massey and Denton have shown is critical to integrated living patterns cannot take place until segregated minority neighborhoods have achieved levels of stability (and ultimately prosperity) that only remedial investment can bring. The impending wave of municipal lawsuits has the potential to bring that investment and, with it, renewed hope for progress on the integration front.

As with any new litigation strategy, the tendency exists to overstate the possibilities when the ideas are fresh and untested. That risk exists here as well. What makes this moment different is the ample evidence of powerful outcomes when public bodies pool their resources to attack a problem. America’s mayors have the ability to do now what State Attorneys General have many times shown to be possible when they have come together to fight a common foe—whether it be tobacco, drugs, or guns.<sup>13</sup>

The purpose of this Article is to discuss and explore the opportunity this new litigation initiative creates to deal with the unresolved problem of integration. The context for this discussion is Baltimore, where the first of the municipal suits has been filed.<sup>14</sup> Part I sets out the factual background for the Baltimore suit. Part II discusses the specific allegations against the defendant Wells Fargo and the basis for the FHA violations alleged. Part III discusses the injury to the city and the methodological means by which any city faced with similar facts can both prove and quantify the injury. Finally, Part IV explores the implications that the remedies sought by Baltimore have for the broader struggle to promote integration.

It is this last connection—that between the litigation objective and unresolved FHA objective of integration—that remains the most difficult to unravel. Explaining our failure to achieve integrated living patterns forty years after the passage of the FHA requires an understanding of American history and

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[hereinafter Balt. Complaint].

11. *Id.* ¶ 5.

12. *See, e.g.*, Complaint ¶ 9, City of Cleveland v. Deutsche Bank Trust Co., No. CV-08-646970 (Ohio Ct. Com. Pl. Jan. 10, 2008) [hereinafter Cleveland Complaint] (asserting public nuisance, not fair housing, claim).

13. *See, e.g.*, STATE CANCER LEGISLATIVE DATABASE PROGRAM, NAT’L CANCER INST., TOBACCO SETTLEMENT (2000), <http://www.sclld-nci.net/factsheets/pdf/FactSht1-00.pdf>.

14. Balt. Complaint, *supra* note 10.

race relations that could fill volumes. What is clear is that the subprime mortgage foreclosure crisis has presented us with a new opportunity to take critically important steps through litigation toward stabilizing badly damaged minority neighborhoods in a way that will promote integration. They may be first steps, but they are essential if we are to continue to make progress in fulfilling Dr. King's dream, and the noble purpose of our fair housing laws.

## I. BALTIMORE AS CASE STUDY: FACTUAL BACKGROUND OF *BALTIMORE V. WELLS FARGO*

### A. *The Foreclosure Crisis and Baltimore*

Like many cities across the country, Baltimore faces an unprecedented crisis of residential mortgage foreclosures. There have been more than 33,000 foreclosure filings since 2000,<sup>15</sup> and the Maryland Department of Housing and Community Development reported in October 2007 that the number of foreclosure-related events in Baltimore—notices of default, foreclosure sales, and lender purchases of foreclosed properties—increased an extraordinary five-fold from the first to the second quarter of last year.<sup>16</sup>

Nationwide, the foreclosure crisis is worsening rapidly and is expected to deteriorate further. The number of foreclosure filings nearly doubled from the third quarter of 2006 to the third quarter of 2007.<sup>17</sup> One out of every seventeen mortgage holders is no longer able to make payments on time, the highest rate in over twenty years.<sup>18</sup> Delinquent payments are a strong indicator of near-term foreclosure filings. Equally important, approximately 150,000 adjustable rate loans are resetting to higher interest rates every month.<sup>19</sup> In 2008, \$362 billion in subprime loans will reset to higher rates.<sup>20</sup> As the housing market continues to decline, many of these adjustments will result in foreclosures. The Joint Economic Committee of Congress predicts that from 2007 to 2009 there could be nearly two million foreclosures nationwide on homes purchased with subprime loans.<sup>21</sup>

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15. Balt. Complaint, *supra* note 10, ¶ 1.

16. MD. DEP'T OF HOUS. & CMTY. DEV., PROPERTY FORECLOSURES IN MARYLAND SECOND QUARTER 2007, at 12 (2007), <http://www.dhcd.state.md.us/Website/home/document/PropForeclosEventsMaryland100407.pdf>.

17. Editorial, *Spreading the Misery*, N.Y. TIMES, Nov. 29, 2007, at A30.

18. Balt. Complaint, *supra* note 10, ¶ 16; see Sudeep Reddy, *Home Foreclosures Surge to a New High*, WALL ST. J., Dec. 6, 2007, at 2 (5.59% delinquency rate is highest since 1986).

19. Ruth Simon, *Rising Rates to Worsen Subprime Mess—Interest Payments Set to Grow on \$362 Billion in Mortgages in 2008*, WALL ST. J., Nov. 24, 2007, at A1.

20. *Id.*

21. MAJORITY STAFF OF THE JOINT ECON. COMM., 110TH CONG., THE SUBPRIME LENDING CRISIS: THE ECONOMIC IMPACT ON WEALTH, PROPERTY VALUES AND TAX REVENUES, AND HOW WE GOT HERE 12 (2007) [hereinafter THE SUBPRIME LENDING CRISIS]. Of the forty-four million active mortgages throughout the country currently tracked by the Mortgage Bankers Association

Foreclosures have multiple and far-reaching impacts on cities like Baltimore, especially when they are concentrated in distressed neighborhoods that are already struggling with issues of economic development and poverty. Foreclosures in these neighborhoods frequently lead to abandoned and vacant homes.<sup>22</sup> Estimates of the number of vacant homes in Baltimore range from 16,000 to 30,000.<sup>23</sup> Concentrated vacancies driven by foreclosures cause neighborhoods, especially ones already struggling, to decline rapidly.<sup>24</sup>

As discussed in Part III below, one example of how foreclosures and consequent vacancies harm neighborhoods is by reducing the property values of nearby homes.<sup>25</sup> In Baltimore, as in other cities, foreclosures are responsible for the loss of hundreds of millions of dollars in the value of homes. This, in turn, reduces the city's revenue from property taxes.<sup>26</sup> It also makes it harder for the city to borrow funds because the value of the property tax base is used to qualify for loans.

Cities with high rates of foreclosure, like Baltimore, must spend additional funds for services related to foreclosures, including the costs of securing vacant homes, holding administrative hearings, and conducting other administrative and legal procedures.<sup>27</sup> The funds expended also include the costs of providing

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("MBA"), approximately 343,000 entered foreclosure during the third quarter of 2007. *Balt. Complaint*, *supra* note 10, ¶ 15; *see* Mortgage Bankers Ass'n, National Delinquency Study, <http://www.mortgagebankers.org/ResearchandForecasts/ProductsandSurveys/NationalDelinquencySurvey.htm> (listing MBA sample as forty-four million) (last visited Apr. 12, 2008); Press Release, Mortgage Bankers Ass'n, Delinquencies and Foreclosures Increase in Latest MBA National Delinquency Survey (Dec. 6, 2007), <http://www.mortgagebankers.org/NewsandMedia/PressCenter/58758.htm> (discussing MBA survey that found 0.78% of loans entered foreclosure in third quarter). This is the highest rate of foreclosures in more than thirty-five years. *Compare* David S. Hilzenrath & Dina ElBoghdady, *Quarterly Foreclosure Rate Again Sets Record—Defaults May Hurt Home Prices, Overall Economy*, WASH. POST, Sept. 7, 2007, at D1 (stating that second quarter rate of 0.65% was highest since MBA began survey in 1972). Overall, over 740,000 properties tracked by the MBA were in some stage of foreclosure during the third quarter of 2007, up 21% from the second quarter. Press Release, *supra* (discussing MBA survey that found 1.69% of loans in the foreclosure process, up 29 basis points).

22. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 57 (2006).

23. *See* Joe Milicia, *Cities Fight Glut of Vacant Houses: Baltimore Among Cities Losing Millions in Taxes on Abandoned Homes*, BALT. SUN, Feb. 11, 2008, <http://www.baltimoresun.com/business/realestate/bal-foreclosure0211,0,5826159.story> (16,000); Editorial, *Taking It to the Bank*, BALT. SUN, Oct. 14, 2007, at 16A (30,000). Estimates of abandoned and vacant housing in other cities are likely even higher. In Cleveland, for example, the rate of foreclosures for 2007 has been estimated at twenty per day. *Cleveland Complaint*, *supra* note 12, ¶ 57.

24. Immergluck & Smith, *supra* note 22, at 59.

25. *See infra* note 110 and accompanying text.

26. *See* THE SUBPRIME LENDING CRISIS, *supra* note 21, at 16.

27. *See* ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND:

additional police and fire protection as vacant properties become centers of dangerous and illicit activities.<sup>28</sup>

### *B. The Role of Subprime Lending*

The growing crisis of foreclosures in Baltimore and across the nation is due in large part to the rapid expansion of subprime lending. Subprime lending developed in the mid-1990s as a result of innovations in risk-based pricing and in response to the demand for credit by borrowers who were denied prime credit by traditional lenders.<sup>29</sup>

Prior to the emergence of subprime lending, most mortgage lenders made only "prime" loans.<sup>30</sup> Prime lending offered uniformly priced loans to borrowers with good credit.<sup>31</sup> Individuals with "blemished credit" were not eligible for prime loans.<sup>32</sup> Although borrowers with blemished credit might still represent a good mortgage risk at the right price, prime lending did not provide the necessary flexibility in price or loan terms to serve these borrowers.<sup>33</sup>

In the early 1990s, technological advances in automated underwriting allowed lenders to predict with improved accuracy the likelihood that a borrower with blemished credit will successfully repay a loan.<sup>34</sup> This gave lenders the ability to adjust the price of loans to match the different risks presented by borrowers whose credit records did not meet prime standards.<sup>35</sup> Lenders found that they could now accurately price loans to reflect the risks presented by a particular borrower.<sup>36</sup> When done responsibly, this made credit available much more broadly than had been the case with prime lending.

As the technology of risk-based pricing developed rapidly in the 1990s, so did the market in subprime mortgages. Subprime loans accounted for only 10% of mortgage loans in 1998, but within eight years grew to 23% of the market.<sup>37</sup> Currently, outstanding subprime mortgage debt stands at \$1.3 trillion, up from

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FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 24 (2006), <http://www.responsiblelending.org/pdfs/FC-paper-12-19-new-cover-1.pdf>.

28. *See Immergluck & Smith, supra* note 22, at 59.

29. *See John P. Relman, Taking it to the Courts; Litigation and the Reform of Financial Institutions*, in ORGANIZING ACCESS TO CAPITAL: ADVOCACY AND THE DEMOCRATIZATION OF FINANCIAL INSTITUTIONS 55, 65 (Gregory D. Squires ed., 2003).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See William B. Senhauser & John P. Relman, Reflections on the Airlie Conference, in THE ROLE OF AUTOMATED UNDERWRITING IN EXPANDING MINORITY HOMEOWNERSHIP: CONFERENCE PROCEEDINGS* 9, 11-12, 16 (Fannie Mae ed., 2001).

35. *See id.* at 17-18.

36. *Id.* at 15-18.

37. *See SCHLOEMER ET AL., supra* note 27, at 7.

\$65 billion in 1995 and \$332 billion in 2003.<sup>38</sup> These subprime loans have allowed millions of borrowers to obtain mortgages, at marginally increased prices, even though their credit profiles do not qualify them for lower-cost prime loans.<sup>39</sup> They have opened the door to homeownership to many people, especially low- to moderate-income and minority consumers, who otherwise would have been denied mortgages.<sup>40</sup> At the same time, subprime lending has created opportunities for unscrupulous lenders to engage in irresponsible lending practices that result in loans that borrowers cannot afford.<sup>41</sup> This, in turn, has led directly to defaults and foreclosures.

Enticed by the prospect of short-term profits resulting from exorbitant origination fees, points, and related pricing schemes, many irresponsible subprime lenders took advantage of a rapidly rising real estate market to convince borrowers to enter into loans that they could not afford. Often this was accomplished with the help of deceptive practices and promises to refinance at a later date.<sup>42</sup> These abusive subprime lenders did not worry about the consequences of default or foreclosure to their business because once made, the loans were sold on the secondary market.<sup>43</sup>

As the subprime market grew, the opportunities for abusive practices grew with it. These practices include: (a) enticing borrowers into adjustable rate loans with low “teaser rates” that would automatically reset to much higher market rates after an introductory period, often with false promises to refinance the loan before the introductory period ended; (b) encouraging borrowers to refinance loans unnecessarily for the purpose of collecting closing costs, fees, and higher interest rates; (c) charging “yield spread premiums” that allow the lender to profit from interest rates that are higher than the rate the borrower qualifies for and can actually afford; (d) ignoring traditional underwriting criteria such as debt-to-income ratio, loan to value ratio, FICO score, cash reserves, and work history, against the borrower’s best interest, all for the purpose of maintaining the short term profit that comes from high loan volumes, closing costs, and transaction fees; (e) charging excessive points and fees; and (f) requiring substantial prepayment penalties to prevent borrowers with improved credit or equity from moving from a subprime to prime loan.<sup>44</sup>

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38. JOINT ECON. COMM., 110TH CONG., SHELTERING NEIGHBORHOODS FROM THE SUBPRIME FORECLOSURE STORM 4 (2007) [hereinafter SHELTERING NEIGHBORHOODS].

39. *See id.* at 3.

40. SCHLOEMER ET AL., *supra* note 27, at 7.

41. *See infra* note 44 and accompanying text.

42. *See* Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 16-21 (D.D.C. 2000).

43. *See* SCHLOEMER ET AL., *supra* note 27, at 6; THE SUBPRIME LENDING CRISIS, *supra* note 21, at 20.

44. *See, e.g.*, SCHLOEMER ET AL., *supra* note 27, at 5-6; SHELTERING NEIGHBORHOODS, *supra* note 38, at 1-3; THE SUBPRIME LENDING CRISIS, *supra* note 21, at 10, 20-22; U.S. DEP’T OF HOUS. & URB. DEV. & U.S. DEP’T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 2 (2000), <http://www.huduser.org/Publications/pdf/treasrpt.pdf> [hereinafter CURBING PREDATORY HOME LENDING]; *see generally* John P. Relman et al., *Designing Federal*

As long as housing prices continued to rise, the deleterious effect of these practices was delayed and, thus, hidden.<sup>45</sup> When the real estate bubble burst earlier in 2007, the inevitable occurred, and foreclosure rates began their dramatic rise.<sup>46</sup> Bent on maximizing short-term profits and protected by the ability to sell their loans on the secondary market, irresponsible subprime lenders left countless homeowners saddled with mortgage debts they cannot afford and no way to save their homes in a declining housing market.<sup>47</sup>

### *C. Foreclosure Disparities in Baltimore's African-American Neighborhoods*

Nationwide, the impact of the foreclosure crisis is felt most acutely in minority communities. According to one recent report, nationwide, subprime borrowers of color will lose between \$164 billion and \$213 billion as a result of loans made in the past eight years, reflecting the fact that "people of color are more than three times" as likely as whites to have high cost, subprime loans.<sup>48</sup> The same is true in Baltimore. Citywide census tracts that are above 80% African-American account for 49% of Baltimore's foreclosure filings, even though these same tracts account for only 37% of the City's owner-occupied households.<sup>49</sup> Many housing advocates point to the practice of "reverse redlining" as a major cause of this disparity.<sup>50</sup>

As used by Congress and the courts, the term "reverse redlining" refers to the practice of targeting residents in certain geographic areas for credit on unfair terms due to the racial or ethnic composition of the area.<sup>51</sup> In contrast to "redlining," which is the practice of denying *prime* credit to specific geographic areas because of the racial or ethnic composition of the area, reverse redlining involves the targeting of an area for the marketing of deceptive, predatory or otherwise deleterious lending practices because of the race or ethnicity of the area's residents.<sup>52</sup> This practice has repeatedly been held to violate the Federal Fair Housing Act.<sup>53</sup>

Reverse redlining typically flourishes in cities where two conditions are met.

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*Legislation that Works: Legal Remedies for Predatory Lending*, in WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING 153 (Gregory D. Squires ed., 2004).

45. THE SUBPRIME LENDING CRISIS, *supra* note 21, at 2.

46. See CURBING PREDATORY HOME LENDING, *supra* note 44, at 1; SCHLOEMER ET AL., *supra* note 27, at 3-4.

47. SCHLOEMER ET AL., *supra* note 27, at 3-4.

48. AMAAD RIVERA ET AL., UNITED FOR A FAIR ECONOMY, FORECLOSED: STATE OF THE DREAM 2008, at vii (2008), [http://www.faireconomy.org/files/StateOfDream\\_01.16.08\\_Web.pdf](http://www.faireconomy.org/files/StateOfDream_01.16.08_Web.pdf).

49. Balt. Complaint, *supra* note 10, ¶ 34.

50. See, e.g., *id.*

51. See, e.g., Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

52. See, e.g., *id.*

53. See, e.g., Barkley v. Olympia Mortgage Co., 2007 WL 2437810, at \*13-15 (E.D.N.Y. Aug. 22, 2007); *Hargraves*, 140 F. Supp. 2d at 20.

First, the practice afflicts cities where minorities historically have been denied access to credit and other banking services. The legacy of historic discrimination, or redlining, often leaves the residents of minority communities desperate for credit, and without the knowledge or experience required to identify loan products and lenders offering products with the most advantageous terms for which they might qualify. Instead, residents of underserved minority communities often respond favorably to the first offer of credit made, without regard to the fairness of the product. This makes them especially vulnerable to irresponsible subprime lenders who, instead of underwriting carefully to ensure that the loans they offer are appropriate for their customers, engage in the unscrupulous lending practices.<sup>54</sup>

Second, reverse redlining arises in cities where there are racially segregated residential living patterns. This means that the people who are most vulnerable to abusive lending practices are geographically concentrated and therefore easily targeted by lenders.

Both of these conditions are present in Baltimore. First, Baltimore's minority communities historically have been victimized by traditional redlining practices. Through much of the twentieth century the federal government, mortgage lenders, and other private participants in the real estate industry acted to deny homeownership opportunities and choices to the city's African-Americans.<sup>55</sup> The practice and effects of widespread redlining in Baltimore persisted for decades.<sup>56</sup> An analysis of data from the 1980s, long after much of the institutionalized governmental and corporate apparatus of discrimination had been dismantled, found that the more African-American residents in a Baltimore neighborhood, the fewer mortgage loans and dollars the neighborhood received.<sup>57</sup> The same study also found that while 73% of majority white census tracts received a medium or high volume of single family mortgage loans, the same was true of only 5% of majority African-American tracts.<sup>58</sup>

Second, the city is highly segregated between African Americans and whites. Even though Baltimore is 64% African-American and 32% white, many neighborhoods have a much higher concentration of one racial group or the

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54. *See supra* note 44 and accompanying text.

55. The Secretary of the United States Department of Housing and Urban Development admitted in 1970 that the federal government had "refus[ed] to provide insurance in integrated neighborhoods, promot[ed] the use of racially restrictive covenants," and engaged in other methods of redlining. *Thompson v. HUD*, 348 F. Supp. 2d 398, 466 (D. Md. 2005). The federal government even published a map in 1937 titled "Residential Security Map for Baltimore" designed to facilitate private redlining by mortgage providers. *Id.* at 471. Mortgage lenders actively engaged in redlining for decades, treating "black and [the few] integrated neighborhoods as unstable and risky." Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 319 (1983).

56. Power, *supra* note 55, at 320.

57. ANNE B. SHLAY, MD. ALLIANCE FOR RESPONSIBLE INV., MAINTAINING THE DIVIDED CITY: RESIDENTIAL LENDING PATTERNS IN THE BALTIMORE SMSA 44 (1987).

58. *Id.* at 36.

other.<sup>59</sup>

## II. BALTIMORE'S ALLEGATIONS AGAINST WELLS FARGO

Against this backdrop of mounting foreclosures and damage to Baltimore's African-American neighborhoods, in January 2008 the City of Baltimore filed suit against one particular lender with a large presence across the city—Wells Fargo.<sup>60</sup> At the heart of the complaint rests the allegation that Wells Fargo has "engaged in a pattern and practice of unfair, deceptive and discriminatory lending [practices]," targeted at Baltimore's African-American neighborhoods, that has resulted in disproportionately high rates of foreclosure and consequent financial damage in these communities, as well as direct and continuing financial harm to the City of Baltimore.<sup>61</sup> Wells Fargo, in short, is alleged to have engaged in a practice of "reverse redlining" that violates the FHA.<sup>62</sup>

### A. *Wells Fargo's Foreclosure Rates*

Baltimore's complaint raises a number of specific factual allegations about Wells's lending practices based on the type and location of its loans. First, the City contends that, as one of Baltimore's largest lenders, Wells Fargo "has made at least 1285 mortgage loans in Baltimore in each of the last three years, with a collective value of over \$600 million."<sup>63</sup> In each of these years, it has been one of the top two mortgage lenders in the City, making loans in both the white and African-American neighborhoods of Baltimore.<sup>64</sup> Wells Fargo is also alleged to have "the largest number of foreclosures in Baltimore of any lender—at least 135 from 2005 to 2006."<sup>65</sup>

The City further alleges, however, that "[h]alf of Wells Fargo's foreclosures from 2005 to 2006 were in census tracts that are more than 80% African-American and two-thirds were in tracts that are over 60% African-American, but

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59. Balt. Complaint, *supra* note 10, ¶ 33. In its complaint against Wells Fargo, the City of Baltimore alleges, for example, that "the African-American population exceeds 90% in East Baltimore, Pimlico/Arlington/Hilltop, Dorchester/Ashburton, Southern Park Heights, Greater Rosemont, Sandtown-Winchester/Harlem Park, and Greater Govans. It exceeds 75% in Waverly and Belair Edison." *Id.* The complaint also alleges that "the white population of Greater Roland Park/Poplar, Medfield/Hampden/Woodberry, and South Baltimore exceeds 80%, and the white population of Cross-Country/Cheswolde, Mt. Washington/ColdSpring, and North Baltimore/Guilford/Homeland exceeds 70%." *Id.*

60. Balt. Complaint, *supra* note 10.

61. *Id.* ¶¶ 4-5.

62. *Id.* ¶¶ 2, 4.

63. *Id.* ¶¶ 10, 35.

64. *Id.*

65. *Id.* ¶ 38. The City's complaint alleges that "[o]nly two other lenders had more than 100 foreclosures during this period"; that "[w]ith at least seventy foreclosures during the first half of 2007, the pace of Wells Fargo's foreclosures is increasing"; and that "at least 108 Wells Fargo loans in Baltimore resulted in foreclosure from 2000 to 2004." *Id.*

only 15.6% were in tracts that are 20% or less African-American.”<sup>66</sup> According to the complaint,

[t]he figures are virtually identical for Wells Fargo’s foreclosures from 2000 to 2004, with more than half in tracts that are more than 80% African-American, 64% in tracts that are over 60% African-American, and only 14.8% in tracts that are 20% or less African-American. Wells Fargo’s foreclosures during the first half of 2007 reflect a similar pattern.<sup>67</sup>

The complaint alleges that “[a]lmost half are in tracts that are more than 80% African-American, while only 11.4% are in tracts that are 20% or less African-American.”<sup>68</sup>

In terms of foreclosure rates, the numbers set out in Baltimore’s complaint are stark:

While 8.2% of Wells Fargo’s loans in predominantly African-American neighborhoods result in foreclosure, the same is true for only 2.1% of its loans in predominantly white neighborhoods. In other words, a Wells Fargo loan in a predominantly African-American neighborhood is nearly four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood.<sup>69</sup>

In contrast, the foreclosure rate for all lenders in Baltimore is 4.5%.<sup>70</sup> Thus, the City alleges, “Wells Fargo’s foreclosure rate for loans in African-American neighborhoods is nearly double the overall City average, while the ratio for its loans in white neighborhoods is less than half the average.”<sup>71</sup>

#### *B. Types of Loans Made*

The disparity in foreclosure rates, the complaint argues, is explained by the manner in which Wells Fargo has targeted African-American neighborhoods in Baltimore for improper and irresponsible lending practices.<sup>72</sup> The City alleges that the bank’s “[p]attern or practice of failing to follow responsible underwriting practices . . . is evident from the type of loans that result in foreclosure filings in those neighborhoods.”<sup>73</sup>

According to the complaint, approximately 70% of Wells Fargo’s Baltimore loans that result in foreclosure are fixed rate loans. This ratio is the same in both

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66. *Id.* ¶ 37.

67. *Id.*

68. *Id.*

69. *Id.* ¶ 39.

70. *Id.* ¶ 40.

71. *Id.*

72. *Id.* ¶¶ 41-60.

73. *Id.* ¶ 42.

African-American and white neighborhoods.<sup>74</sup> The complaint notes that,

[u]nlike adjustable rate loans, where the price may fluctuate with changing market conditions, the performance of fixed rate loans is relatively easy to predict using automated underwriting models and loan performance data because monthly payments do not vary during the life of the loan. Using these sophisticated risk assessment tools, and relying on traditional underwriting criteria such as FICO scores, debt-to-income ratios, loan-to-value ratios, and cash reserves, any lender, [Baltimore argues], engaged in responsible underwriting practices designed to identify qualified borrowers can predict with statistical certainty the likelihood of default and/or delinquency. Lenders engaged in marketing fixed rate loans in a fair and responsible manner should have no difficulty sifting out unqualified borrowers, or borrowers whose loans would likely result in delinquency, default or foreclosure.<sup>75</sup>

Baltimore contends proper underwriting by Wells Fargo should result in comparable rates of foreclosure in both communities

[b]ecause the percentage of fixed rate loans is so high and the same in both African-American and white neighborhoods . . . . The fact that Wells Fargo's underwriting decisions result in foreclosure nearly four times as often with respect to African-American than white neighborhoods means that it is not following fair or responsible underwriting practices with respect to African-American customers.<sup>76</sup>

### *C. Loan Characteristics and Practices*

Baltimore's complaint identifies four additional aspects of Wells Fargo's loans and lending practices that it alleges support the inference that the foreclosure disparity is the result of improper targeting and irresponsible underwriting. Each is consistent with the conclusion that Wells Fargo has effectively placed an unlawful "thumb on the scale" when it underwrites loans in Baltimore's African-American neighborhoods. Moreover, according to the City, each of these factors is consistent with the conclusion that Wells Fargo is engaged in unfair and discriminatory practices in the city's black community that have the "effect and purpose" of placing inexperienced and underserved borrowers in loans they cannot afford without regard to the borrower's best interest, the borrower's ability to repay, or the financial health of underserved minority neighborhoods.<sup>77</sup>

First, publicly available data reported by Wells Fargo to federal regulators pursuant to the Home Mortgage Disclosure Act shows that in 2006 Wells Fargo

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74. *Id.*

75. *Id.* ¶ 43.

76. *Id.* ¶ 44.

77. *Id.* ¶¶ 4, 46.

made high-cost loans (*i.e.*, loans with an interest rate that was at least three percentage points above a federally-established benchmark) to 65% of its African-American mortgage customers in Baltimore, but only to 15% of its white customers in Baltimore.<sup>78</sup> In 2005, the respective rates were 54% and 14%; while in 2004, the respective rates were 31% and 10%.<sup>79</sup> The proportion of refinance loans that are high cost is especially pronounced. In 2004, 2005, and 2006, a Wells Fargo refinance loan to an African-American borrower was 2.5 times more likely to be high cost than a refinance loan to a white borrower.<sup>80</sup>

While the fact that Wells Fargo's high cost loans are more heavily concentrated in Baltimore's African-American neighborhoods does not prove price discrimination, it is consistent with such practices, as well as other types of improper underwriting often found where there is reverse redlining.<sup>81</sup> Within the subset of high-cost loans, however, the fact that a disproportionately large percentage of Wells Fargo's high-cost loans in African-American neighborhoods are refinance loans is particularly significant, for it is both consistent with and indicative of a deceptive and predatory subprime practice that involves encouraging minority borrowers who already have loans to refinance at excessive cost with little benefit.<sup>82</sup> This practice, Baltimore alleges, "increases the likelihood of foreclosure and, upon information and belief, has contributed to the disproportionately high rate of foreclosures in Baltimore's African-American communities."<sup>83</sup>

Second, according to a Wells Fargo pricing sheet from 2005, the bank requires a 50 basis point *increase* in the loan rate for loans of \$75,000 or less, a 12.5 basis point *decrease* for loans of \$150,000 to \$400,000, and a 25 basis point *decrease* for loans larger than \$400,000.<sup>84</sup> These charges and discounts are applied after Wells Fargo has supposedly priced the borrower based on creditworthiness. The City alleges that these pricing rules have a clear and foreseeable disproportionate adverse impact on African-American borrowers. Loans originated by Wells Fargo in Baltimore from 2004 through 2006 in the amount of \$75,000 and less were nearly twice as likely to be in census tracts where the population is predominantly African-American than in tracts where the population is predominantly white.<sup>85</sup> By contrast, loans originated by Wells Fargo in Baltimore of more than \$150,000 were nearly six times as likely to be in tracts that are predominantly white than in tracts that are predominantly African-American.<sup>86</sup> This too, the City contends, "is consistent with unfair practices associated with reverse redlining and has contributed significantly to

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78. *Id.* ¶ 47.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 49.

82. *Id.*

83. *Id.*

84. *Id.* ¶ 50.

85. *Id.* ¶ 51.

86. *Id.*

the disproportionately large number of foreclosures found in Baltimore's African-American communities.”<sup>87</sup>

Third, Baltimore alleges that inferences about price discrimination based on Wells Fargo's Baltimore loan data are “consistent with findings drawn from data obtained in litigation brought against Wells Fargo in Philadelphia.”<sup>88</sup> In that case, an expert report in a pending lawsuit based on Wells Fargo's Philadelphia loans concluded that Wells Fargo's African-American borrowers, and borrowers residing in African-American neighborhoods, paid more than comparable white residents of predominately white communities.<sup>89</sup>

Fourth, the complaint alleges that there is “a marked disparity with respect to the speed with which [Wells Fargo] loans in African-American and white neighborhoods move into foreclosure.”<sup>90</sup> In Baltimore's African-American neighborhoods, the average time to foreclosure is 2.06 years. In white neighborhoods it is 2.45 years, or 19% longer.<sup>91</sup> The City contends that this “disparity in time to foreclosure [further] demonstrates that Wells Fargo is engaged in irresponsible underwriting in African-American communities.”<sup>92</sup> If Wells Fargo were applying the same underwriting practices in Baltimore's African-American and white neighborhoods, and underwriting borrowers with equal care and attention to proper underwriting practices, the City argues, borrowers in African-American communities would not find themselves in financial straits significantly sooner during the life of their loans than borrowers in white communities.<sup>93</sup> According to the City, “[t]he faster time to foreclosure in African-American neighborhoods is consistent with underwriting practices in the African-American community that are less concerned with determining a borrower's ability to pay and qualifications for the loan than they are in maximizing short-term profit.”<sup>94</sup>

Finally, the complaint alleges that while “2/28” and “3/27” adjustable rate loans do not represent the bulk of the Wells Fargo loans that went to foreclosure in Baltimore, a significant portion (30%) of the bank's foreclosures in African-

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87. *Id.* ¶ 52.

88. *Id.* ¶ 53.

89. *Id.* (quoting Affidavit of L. Goldstein ¶ 7, *Walker v. Wells Fargo Bank, N.A.*, No. 05-cv-6666 (E.D. Pa. July 20, 2007)).

90. *Id.* ¶ 61.

91. *Id.*

92. *Id.* ¶ 62.

93. *Id.*

94. *Id.* The City points out that

[t]his difference in time to foreclosure is especially important because foreclosures occur more quickly in Baltimore than in neighboring jurisdictions. For all lenders, the average time from loan origination to foreclosure in Baltimore is three years, while in Philadelphia it is four years and in New Castle County, Delaware (which includes Wilmington) it is 4.3 years. This means that the injuries that result from foreclosures in Baltimore are compounded, and therefore grow, at a faster pace.

*Id.* ¶ 63.

American neighborhoods involved these unusually risky and deceptive loan products.<sup>95</sup> The City contends that “Wells Fargo [did] not properly underwrite these loans when made to African Americans, and . . . [did] not adequately consider the borrowers’ ability to repay these loans, especially after the teaser rate expires and the interest rate increases.”<sup>96</sup> As a result, these loans resulted in delinquency, default, and foreclosure for many African-American borrowers—a result that was, or should have been, clearly foreseeable to Wells Fargo at the time the loans were made.<sup>97</sup>

As with the other practices identified above, Baltimore contends that the use of these risky adjustable rate mortgage products “is consistent with the practice of reverse redlining, has subjected African-American borrowers to unfair and deceptive loan terms, and has contributed significantly to the high rate of foreclosure found in Baltimore’s African-American neighborhoods.”<sup>98</sup>

### III. QUANTIFYING INJURY TO THE CITY

#### A. *Municipal Standing*

As noted in Part II above, the FHA provides a clear cause of action for the lending practices in which Wells Fargo is alleged to have engaged. Since Judge Joyce Hens Green’s landmark decision in *Hargraves v. Capital City Mortgage Corp.*,<sup>99</sup> numerous courts across the country have held that reverse redlining violates the FHA.<sup>100</sup> Thus, if Wells Fargo has done what Baltimore alleges, it

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95. *Id.* ¶ 55.

96. *Id.* ¶ 56.

97. *Id.*

98. *Id.* ¶ 57. With respect to the adjustable rate mortgage loan products, the City further alleges that Wells Fargo had discretion to apply different caps on the interest rates charged. *Id.* ¶ 58. “The cap is the maximum rate that a borrower can be charged during the life of an adjustable rate loan.” *Id.* According to the complaint, “[t]he average cap on a Wells Fargo adjustable rate loan that was subject to foreclosure in 2005 or 2006 in predominantly African-American neighborhoods was 14.13%. The cap on such loans in predominantly white neighborhoods was only 13.61%.” *Id.* ¶ 59. This disparity, the City alleges, is further evidence of a pattern or practice of unfair and improper lending in Baltimore’s African-American neighborhoods that has contributed to an unnecessarily high rate of foreclosure. *See id.* ¶¶ 4, 60.

99. 140 F. Supp. 2d 7 (D.D.C. 2000).

100. *See* Munoz v. Int’l Home Capital Corp., No. C 03-01099 RS, 2004 WL 3086907, at \*4 (N.D. Cal. May 4, 2004); Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874, 886-87 (S.D. Ohio 2002); Johnson v. Equicredit Corp. of Am., No. 01 C 5197, 2002 WL 448991, at \*5-6 (N.D. Ill. Mar. 22, 2002); Eva v. Midwest Nat’l Mortgage Bank, Inc., 143 F. Supp. 2d 862, 868 (N.D. Ohio 2001); *see also* Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) (holding that reverse redlining violates New Jersey’s Law Against Discrimination); McGlawn v. Pa. Human Relations Comm’n, 891 A.2d 757, 761 (Pa. Commw. Ct. 2006) (holding that reverse redlining violates fair housing provisions of Pennsylvania Human Relations Act).

will be held liable for violating the Act.

In this sense, the FHA provides a unique legal vehicle for attacking the practices that are of such current concern to cities across the country, like Baltimore, whose minority communities are bearing the brunt of the foreclosure crisis. The FHA, however, is uniquely positioned in other ways as well—ones that concern the related issues of standing and remedies.

Standing to sue under the FHA extends as broadly as Article III of the Constitution will allow; Congress and the courts have determined that there are no prudential limitations on standing.<sup>101</sup> The statute itself provides that any “person” aggrieved by conduct made illegal by the Act may bring suit.<sup>102</sup> The FHA defines “person” to include corporations.<sup>103</sup> Many cities, like Baltimore, are incorporated and thus fall directly within the definition of “person” for purposes of standing. Indeed, the plaintiff in one of the Supreme Court’s relatively few FHA cases was a municipal corporation.<sup>104</sup> This means that where a city claims injury from the reverse redlining practices of a given lender, it has standing to pursue a federal fair housing claim against that entity.

### *B. Damages*

When it comes to remedies, the FHA is equally useful to municipal plaintiffs like Baltimore. As originally drafted in 1968, the FHA permitted aggrieved persons to recover unlimited compensatory damages, but capped punitive damages at \$1000.<sup>105</sup> In 1988, the Act was amended to remove the cap on punitive damages.<sup>106</sup> Any municipality, therefore, that brings a reverse redlining

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101. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

102. 42 U.S.C. § 3613(a)(1)(A) (2000).

103. *Id.* § 3602(d).

104. *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 93 (1979). In the decision under review, the Seventh Circuit held that a village, as a municipal corporation, had standing as a “person” under the FHA. *Vill. of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1020 n.8 (7th Cir. 1978), *aff’d in part*, 441 U.S. 91 (1979). The Supreme Court noted the Seventh Circuit’s holding, but did not address the issue because it had been raised belatedly. *Gladstone Realtors*, 441 U.S. at 109 n.21; *see also City of Chi. v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (finding Chicago had standing under FHA); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) (Village of Bellwood had standing under FHA); *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 138-39 (6th Cir. 1985) (finding Cleveland Heights had standing under FHA).

105. *See N.J. Coal. of Rooming & Boarding House Owners v. Mayor & Council of City of Asbury Park*, 152 F.3d 217, 223 (3d Cir. 1998) (discussing limitation on punitive damages as FHA was originally enacted).

106. *See id.* at 223-24 (discussing 1988 amendment whereby Congress removed the \$1000 ceiling on punitive damages); Fair Housing Amendments Act of 1988, § 8, 42 U.S.C. § 3613(c)(1) (2000) (“[T]he court may award to the plaintiff actual and punitive damages . . .”).

claim may seek unlimited punitive damages against a defendant lender—subject only to constitutional due process limitations having to do with the ratio of the size of punitive to compensatory damages.<sup>107</sup>

Damages, of course, must be proven. However, here too, the empirical and methodological foundation is strong for cities, like Baltimore, that seek to show the precise harm in dollar terms that they have suffered from the current wave of foreclosures.

As a general matter, foreclosures caused by discriminatory reverse redlining practices produce multiple types of injuries to a city like Baltimore. Foreclosures result in a dramatic increase in the number of abandoned and vacant homes.<sup>108</sup> Frequently concentrated in compact, clearly defined geographic areas, these abandoned properties become centers for squatting, drug use, drug distribution, prostitution, and other illegal activities.<sup>109</sup> The costs to the city are enormous: increased expenditures to secure the newly abandoned and vacant homes; increased expenditures for police and fire protection; additional expenditures to acquire and rehabilitate vacant properties, where possible; and new outlays of tax dollars to fund social programs to stabilize the affected neighborhoods and deal with the homelessness, job loss, and educational needs that inevitably flow from the displacement and relocation of residents who have lost their primary (and often only) investment.<sup>110</sup>

Foreclosures result in two other forms of financial damage to the city as well. First, abandoned and vacant properties in a neighborhood produce a clearly identifiable decline in the value of nearby homes, resulting in a significant decrease in property tax revenue. Cities also lose revenue from real estate transfer taxes because foreclosures depress the market for home sales. Second, there are large costs to a city associated with the processing of foreclosed properties through the city or county legal or administrative system.

Most, if not all, of these costs are fully capable of empirical quantification. Recent studies have pioneered new methodologies for calculating these damages. A study published by the Fannie Mae Foundation, using Chicago as an example, determined that each foreclosure is responsible for an average decline of approximately 1% in the value of each single-family home within an eighth of a mile.<sup>111</sup> A second study in Philadelphia found that each home within 150 feet of an abandoned home declined in value by an average of \$7627; homes within 150 to 299 feet declined in value by \$6810; and homes within 300 to 449 feet

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107. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-29 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-86 (1996).

108. Immergluck & Smith, *supra* note 22, at 57.

109. *Id.* at 59.

110. See WILLIAM C. APGAR ET AL., HOMEOWNER PRESERVATION FOUND., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 20-29 (2005), [http://www.995hope.org/content/pdf/Apgar\\_Duda\\_Study\\_Full\\_Version.pdf](http://www.995hope.org/content/pdf/Apgar_Duda_Study_Full_Version.pdf); Immergluck & Smith, *supra* note 22, at 58-59.

111. See Immergluck & Smith, *supra* note 22, at 58.

declined in value by \$3542.<sup>112</sup>

Likewise, the costs of increased municipal services that are necessary because of foreclosures have also been analyzed empirically. A recent study commissioned by the Homeownership Preservation Foundation isolated twenty-six types of costs incurred by fifteen government agencies in response to foreclosures in Chicago.<sup>113</sup> It then analyzed the amount of each cost based on different foreclosure scenarios, such as whether the home is left vacant, whether and to what degree criminal activity ensues, and whether the home must be demolished.<sup>114</sup> The study found that the total costs ran as high as \$34,199 per foreclosure.<sup>115</sup>

The point to be made here is a simple one. For litigation purposes, the damages caused by a company like Wells Fargo's reverse redlining practices are not—as defense lawyers routinely charge—speculative or hypothetical. Baltimore has alleged that Wells Fargo's unlawful targeting practices resulted in unnecessary and avoidable foreclosures in African-American neighborhoods.<sup>116</sup> Expert analyses similar to the studies conducted in Philadelphia and Chicago are capable of showing the precise dollar damage resulting from these discriminatory practices by focusing on the costs that can be empirically tied to a foreclosure and then multiplying that by the number of foreclosures attributable to a given company, like Wells Fargo.

In terms of the size of the damages, the stakes for offending companies are high. Baltimore alleges that the damages and costs caused by Wells Fargo's discriminatory lending practices "are in the tens of millions of dollars."<sup>117</sup> There are several reasons for this. Although the statute of limitations for FHA claims is two years, the Supreme Court has applied a continuing violations theory where a pattern or practice of discriminatory acts extends into the limitations period.<sup>118</sup> This means that a defendant engaged in an ongoing pattern of illegal conduct will be held liable for discriminatory acts extending as far back in time as the evidence leads. Cities like Baltimore, therefore, are free to pursue damages for illegal conduct that has resulted in foreclosures over many years—in many cases going back to the incipient stages of the subprime mortgage market frenzy.

Damages are high for a second reason as well, but not one necessarily related to the absolute number of foreclosures. In many cities the foreclosures caused

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112. ANNE B. SHLAY & GORDON WHITMAN, RESEARCH FOR DEMOCRACY: LINKING COMMUNITY ORGANIZING AND RESEARCH TO LEVERAGE BLIGHT POLICY 20 (2004), <http://comm-org.wisc.edu/paper2004/shlay/shlay.htm>.

113. APGAR ET AL., *supra* note 110, at 1.

114. *See id.* at 23-27.

115. *Id.* at 28.

116. Balt. Complaint, *supra* note 10, ¶ 64.

117. *Id.* ¶ 70.

118. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982); *see also, e.g.*, *Silver State Fair Hous. Council, Inc. v. ERGS, Inc.*, 362 F. Supp. 2d 1218, 1221-22 (D. Nev. 2005) (applying continuing violation doctrine to design and construction of multiple apartment buildings in violation of FHA's accessibility requirements for people with disabilities).

by reverse redlining are particularly injurious because they are concentrated in distressed and transitional neighborhoods. These are frequently communities with high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values. These characteristics make transitional neighborhoods most vulnerable to the deleterious effects of foreclosures.

The Supreme Court has often held that the FHA “sounds basically in tort.”<sup>119</sup> As with a personal injury cause of action, defendants must take their plaintiffs as they find them, even if the consequent injury is worse as a result of a pre-existing condition.<sup>120</sup> Such is the case here. If minority neighborhoods are particularly vulnerable to a company’s predatory practices, with the resulting injury to the city being greater as a function of increased programmatic costs required to stabilize these transitional neighborhoods, the defendant remains liable for damages regardless of size or extent.

Suffice it to say that the potential scope of damages in municipal foreclosure cases brought under the FHA is both large and provable. The Act’s generous standing and statute of limitations provisions, and the manner in which they have been interpreted by the Supreme Court—coupled with the methodological advances for proving damages highlighted in recent studies—means that this law is capable of providing cities with a powerful remedy for the destructive practices that have so badly hurt minority neighborhoods.

The extent to which these remedies will also be able to address the goal of promoting integrated living patterns is a more complicated question, but one of vital importance for the future of the FHA. It is to this question that the discussion now turns.

#### IV. FORECLOSURES AND INTEGRATION: THE FIGHT TO SAVE A NOBLE GOAL

##### *A. Integration and Non-discrimination*

Two broad remedial objectives underlie the FHA: non-discrimination and integration. Evidence of these twin goals can be found throughout the statute itself, the legislative history of the 1968 Act, and in Supreme Court decisions interpreting the law.

The Act’s preface declares in sweeping language that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>121</sup> The Supreme Court has interpreted this language to make clear “the broad remedial intent of Congress embodied in the Act,”<sup>122</sup> which in turn reflects “a strong national commitment to promot[ing] integrated housing.”<sup>123</sup> These purposes are also reflected in the broad range of

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119. *Curtis v. Loether*, 415 U.S. 189, 195 (1974), *see also* *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

120. *See, e.g.*, *Richman v. Sheahan*, 512 F.3d 876, 884 (7th Cir. 2008).

121. 42 U.S.C. § 3601 (2000).

122. *Havens Realty Corp.*, 455 U.S. at 380.

123. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977) (citing *Trafficante*

discriminatory practices that the FHA outlaws,<sup>124</sup> and in the virtually unanimous agreement among the circuit courts of appeal that the Act, like Title VII, includes a disparate impact cause of action.<sup>125</sup>

For the most part these goals were viewed by the FHA's legislative sponsors as complementary. Congress adopted the Act in the wake of the highly publicized report by the National Advisory Commission on Civil Disorders, commonly known as the Kerner Report, which had warned that the "[N]ation is moving toward two societies, one black, one white—separate and unequal."<sup>126</sup> Removing barriers to discrimination (the non-discrimination goal), it was thought, would inevitably lead to the eradication of segregation (the integration goal). Thus, the Act's principal sponsor, Senator Mondale, explained that blacks were unable to move to white suburbs because of the "refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels."<sup>127</sup> Similarly, Senator Brooke noted that blacks could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices."<sup>128</sup>

Forty years after passage of the FHA, achieving the goal of integration has met with mixed results. Despite countless successful litigation challenges to discriminatory practices brought by both private parties and the government, studies show that "achieving and sustaining widespread stable racial integration remains an unmet challenge."<sup>129</sup> This is not to say there has not been progress; indeed, some empirical evidence supports the conclusion that "more neighborhoods in metropolitan America are shared by blacks and whites [as of 2004] than [in prior decades], and many racially integrated neighborhoods appear reasonably stable."<sup>130</sup> For every study showing progress, there are others that describe a continuing pattern of entrenched—and in some cases, worsening—

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v. Metro. Life Ins. Co., 409 U.S. 205 (1972)).

124. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

125. See, e.g., *Macone v. Town of Wakefield*, 277 F.3d 1, 5, 7-8 (1st Cir. 2002); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Betsey v. Turtle Creek Ass'n*s, 736 F.2d 983, 986-88 (4th Cir. 1984); *United States v. City of Parma*, 661 F.2d 562, 564-65, 576 (6th Cir. 1981); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-49 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

126. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968).

127. 114 Cong. Rec. 2277 (1968).

128. *Id.* at 2526.

129. RAWLINGS ET AL., *supra* note 5, at 2.

130. *Id.*

segregation.<sup>131</sup>

The reasons for such limited progress are many and complicated. Indeed, on anniversaries of the FHA such as this, advocates regularly spend much time debating the likely causes and the conclusions to be drawn. Some of the failure is undoubtedly attributable to continuing discrimination by landlords and other housing providers. Some of it is likely due to facially neutral practices and policies of local governments that have the effect of reinforcing pre-existing residential segregation. Finally, some of the failure is clearly due to a chronic insufficiency of resources (regardless of political administrations in Washington) available for government enforcement and prosecution of the fair lending laws that both the Congress and state legislatures have worked hard over the last four decades to pass.

Dr. King himself clearly understood the unique challenges posed by the goal of integration. In a sermon he gave in 1962 entitled “The Ethical Demands for Integration,” he explored the role that law could play in “legislating” an end to segregation:

Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles in solving this problem. Morality cannot be legislated, but behaviour can be regulated. . . . Let us not be misled by those who argue that segregation cannot be ended by the force of law.<sup>132</sup>

At the same time, he also understood the limitations of law in achieving integrated living patterns. Ultimately, integration would require fulfillment of an “unenforceable obligation”:

[T]he ultimate solution to the race problem lies in the willingness of men to obey the unenforceable. Court orders and federal enforcement agencies are of inestimable value in achieving desegregation, but desegregation is only a partial, though necessary step toward the final goal which we seek to realize, genuine intergroup and interpersonal living. . . . True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.<sup>133</sup>

Put differently, much of the work of integration requires voluntary steps by persons of good will. The work is hard, takes time, and requires a change not just in law, but in the human heart, before it can take hold and produce results in a form that all can see.

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131. See, e.g., Eric Schmitt, *Segregation Growing Among U.S. Children*, N.Y. TIMES, May 6, 2001, at 28 (citing study performed by researchers at the State University of New York at Albany showing that segregated living patterns of children worsened significantly from 1990 to 2001 in many large Northeastern and Midwestern metropolitan areas).

132. Martin Luther King, Jr., The Ethical Demands for Integration (Dec. 27, 1962), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 117, 124 (James M. Washington ed., 1986).

133. *Id.*

### *B. Foreclosures and Integration*

Charting a full remedial course from segregation to integration is beyond the scope of this Article. That said, and recognizing the limitations of law in legislating a solution to this problem, it is still important to understand the unique role that the FHA can play at the present moment of economic crisis to preserve the gains toward integration that have been made, and position our cities for future progress.

It is here that one must return to Massey and Denton's seminal insight about the effects of hypersegregation on underserved communities.<sup>134</sup> Massey and Denton's work focuses on the compounding destructive effect that spatial segregation has on distressed inner city neighborhoods. Concentrated segregation, they argue, makes it far less likely that transitional neighborhoods will be able to withstand a downward spiral should economic growth flatten or slow.<sup>135</sup>

Reverse redlining, in the form described in Parts II and III above, contributes significantly to that effect. Targeting minority communities for discriminatory and irresponsible lending practices depletes those neighborhoods of vitally needed capital. These practices make it even less likely that communities of color will be able to survive an economic downturn. They increase the likelihood that the spiral will be steep and difficult to stop once it begins.

The current foreclosure crisis takes this problem to a new level. As noted above, recent studies suggest that subprime borrowers of color may lose over \$200 billion as a result of foreclosures generated by loans taken in the last eight years.<sup>136</sup> This massive drain of equity from minority neighborhoods will have the effect of reinforcing barriers to integration by deepening and worsening spatial segregation. An economic downturn under these conditions could lead to a downward spiral of catastrophic proportions for many distressed and transitional communities of color.

There are two primary reasons why loss of equity will worsen spatial segregation. First, achieving integrated living patterns depends not just on the eradication of legal barriers to mobility, but on having the economic means to pursue housing choice. The current foreclosure crisis threatens to strip thousands of minority homeowners of the very equity and asset that—in a rising market—would allow them to move out of poorer, segregated neighborhoods into areas that show promise as stable, integrated communities.

At the same time that foreclosures strip those caught in segregated neighborhoods of the mobility to move out, they also raise barriers to the movement of much needed capital into segregated communities. Foreclosures mean abandoned homes; increased risks of fire, crime, and drugs; increases in homelessness and job loss; deterioration of schools; and a crippling shortage of

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134. See generally MASSEY & DENTON, *supra* note 1.

135. *Id.* at 74-78, 118-30.

136. RIVERA ET AL., *supra* note 48, at 1.

city funds for existing social programs.<sup>137</sup> Foreclosures turn these communities into a “third rail” for private investment dollars, effectively shutting down mobility of both residential buyers and business equity into these neighborhoods. Where rising property values increase the likelihood that investors will break the color line, falling property values ensure the opposite. Less mobility into transitional neighborhoods accelerates the downward spiral in a way that reinforces existing lines of racial separation.

### *C. The Path Forward*

America’s mayors and city councils see all too well what is happening to their communities of color. The foreclosure rate in most cities is expected to grow worse, not better, over the next eighteen months.<sup>138</sup> Taxpayer monies that have been invested in social programs designed to stabilize transitional neighborhoods over the last decade are at risk.<sup>139</sup> City budgets, faced with lost revenues and foreclosure-related expenses, are at risk. Most important, decades of tentative progress toward integrated living patterns are at risk. Once erased, these gains will take decades to restore.

The first step in addressing this crisis is to stop the hemorrhaging by stabilizing communities of color that have been hit the hardest. This requires an immediate investment of capital in these communities to prevent the declining spiral from accelerating. If transitional neighborhoods can ride out the foreclosure storm without succumbing to complete economic collapse, hope remains. The danger, of course, is that foreclosures will reach a tipping point in certain communities that will place them beyond repair and leave them hopelessly hypersegregated and economically deprived for years to come.

It is here, on the fortieth anniversary of its passage, that the FHA has an opportunity to play a vitally important role in furthering its noble goal of integration. The Baltimore litigation provides a template for America’s cities to take the all important first step toward stabilizing communities of color that have been victimized by reverse redlining and unnecessarily high rates of foreclosure.

In a declining economy, America’s cities face mounting budget deficits. Severely damaged by the foreclosure crisis, most cities do not have the funds to plow back into damaged neighborhoods. By focusing on lenders who have engaged in practices that violate the FHA, litigation of the type being pursued by the City of Baltimore has the ability to force private corporations who profited

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137. See *supra* notes 108-15 and accompanying text.

138. See *The Looming Foreclosure Crisis: How to Help Families Save Their Homes: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (written testimony of Mark Zandi, Chief Economist, Moody’s Economy.com) (“[R]esidential mortgage loan defaults and foreclosures are surging and without significant policy changes will continue to do so through the remainder of the decade.”).

139. See John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES, Jan. 15, 2008, at A1; Louis Uchitelle, *For Baltimore, Housing Slump Slows A Revival*, N.Y. TIMES, Oct. 4, 2007, at A1.

at the expense of taxpayers to contribute much needed capital back to the cities who have been left with the financial bill. A litigated solution is particularly just, because it precisely targets only those corporations who can be shown to have enriched themselves wrongfully at the expense of cities and their taxpayers. To the extent that America's mayors find a way to work together in addressing this problem, collective litigation efforts present powerful reasons for large financial institutions to come to the table not as adversaries looking to fight, but as partners trying to help. Some lenders clearly face the risk of exposure in multiple cities and states; the potential cost to these companies of a litigated solution—both reputational and financial—is enormous.

New investment, of course, does not guarantee integrated living patterns. It merely represents a starting point for addressing a larger problem, and at a minimum, a firewall against further losses. The lesson from Baltimore is clear: The FHA provides the standing, the cause of action, and the remedies needed for cities to play a significant role in fighting to save Dr. King's dream. We have reached a critical moment for communities of color. After forty years, it is still not too late. The moment must be seized now, or it will be lost.

# WHAT KINDS OF NEIGHBORHOODS CHANGE LIVES? THE CHICAGO GAUTREAUX HOUSING PROGRAM AND RECENT MOBILITY PROGRAMS

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Neighborhood effects on the lives of families and children have long been an important topic of research, and communities are currently also a relevant topic for public policy. Theoretically, neighborhoods are important contexts for socialization and development as well as places where we see structures of inequality and opportunity in action. Neighborhoods are also significant because they are closely tied to schooling opportunities, given the zoning of public schools. The possibility of choosing different schools, including schools in different neighborhoods, is intended to be a central piece of the No Child Left Behind legislation,<sup>1</sup> and federal courts have recently considered whether to mandate racial or socioeconomic integration in housing and school settings.<sup>2</sup> Neighborhoods have also become the focus of many recent policy discussions. Residential mobility and housing policy garnered national attention after the hurricane disaster in New Orleans, and HOPE VI demolitions are leading to the relocation of inner city families all over the country.<sup>3</sup>

Despite years of research on these topics, it is hard to know for sure if neighborhoods can be used as policy levers to improve youth and family well-being. This is due in large part to two related issues. First, despite relatively high levels of residential mobility in the United States, we see little variation in the types of communities low-income minority families inhabit. Often, poor families are trapped in dangerous neighborhoods, and their children are trapped in poor schools.<sup>4</sup> Therefore, we do not get the chance to observe how a *different*

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1. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 15 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).
2. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).
3. SUSAN J. POPKIN ET AL., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES (2004), [http://www.urban.org/uploadedpdf/411002\\_HOPEVI.pdf](http://www.urban.org/uploadedpdf/411002_HOPEVI.pdf).
4. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AM. J. SOC.

environment might affect their life chances. Second, families choose neighborhoods, and the characteristics of families that lead them to choose certain neighborhoods are also likely to affect family and child well-being. This leads to the selection problem (endogeneity), which plagues our attempts to recover causal estimates of environmental effects. There have been some opportunities, however, to study what happens when parents and children experience moderate to radical changes in their neighborhood or schooling environments. Residential mobility programs, where poor families relocate to opportunity-rich communities via housing vouchers, provide one way we can begin to separate the effects of family background and neighborhood conditions. In this Paper, we review one particularly important mobility plan—Chicago's *Gautreaux* program, examine a decade of research following the fortunes of the families who moved as a part of this intervention, and briefly consider some subsequent programs.

## I. THE GAUTREAUX PROGRAM

As a result of a 1976 Supreme Court decision,<sup>5</sup> the *Gautreaux* program allowed low-income black public housing residents in Chicago to receive Section 8 housing certificates (or vouchers) and move to private-sector apartments either in mostly white suburbs or within the city.<sup>6</sup> Between 1976 and 1998, over 7000 families participated, and over half moved to suburban communities.<sup>7</sup> Because of its design, the *Gautreaux* program presents an unusual opportunity: It allows us to examine whether individual outcomes change when low-income black families move to safer neighborhoods with better labor markets and higher quality schools.

*Gautreaux* participants circumvented the typical barriers to living in suburbs, not by their jobs, personal finances, or values, but by their acceptance into the program and their quasi-random assignment to the suburbs.<sup>8</sup> The program provided housing subsidy vouchers and housing support services, but not employment or transportation assistance.<sup>9</sup> Unlike the usual case of working-class blacks living in working-class suburbs, *Gautreaux* permitted low-income blacks to live in middle- and upper-income white suburbs.<sup>10</sup> Participants moved to more than 115 suburbs throughout the six counties surrounding Chicago.<sup>11</sup> Suburbs

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1040 (1997); Scott J. South & Glenn D. Deane, *Race and Residential Mobility: Individual Determinants and Structural Constraints*, 72 SOC. FORCES 147 (1993).

5. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

6. *Id.* at 304-05.

7. MASSEY & DENTON, *supra* note 4, at 191.

8. Stefanie DeLuca & James E. Rosenbaum, *If Low-Income Blacks Are Given a Chance to Live in White Neighborhoods, Will They Stay? Examining Mobility Patterns in a Quasi-Experimental Program with Administrative Data*, 14 HOUSING POL'Y DEBATE 305, 307 (2003).

9. *Id.*

10. *Id.*

11. *Id.*

with a population that was more than 30% black were excluded by the consent decree, and a few very high rent suburbs were excluded by the funding limitations of Section 8 certificates.<sup>12</sup>

## II. EARLY FINDINGS

Early research on *Gautreaux* showed large and significant relationships between placement neighborhoods and subsequent gains in employment and education. A study of 330 *Gautreaux* mothers in the early 1990s "found that suburban movers had higher employment than city movers," but not higher earnings, and the employment difference was especially large for adults who were unemployed prior to the move.<sup>13</sup> Another study found that, as young adults, *Gautreaux* children who moved to the suburbs were more likely than city movers to graduate from high school, attend college, attend four-year versus two-year colleges, and (if they were not in college) to be employed and to have jobs with better pay and with benefits.<sup>14</sup> These differences were very large.

Analyses indicated that children moving to suburbs were just as likely to interact with neighbors as city movers, but the suburb movers interacted with white children while city movers interacted mostly with black children.<sup>15</sup> The program seems to have been effective at integrating low-income black children into middle-class white suburbs. Although suburban schools were often far ahead of city schools in terms of curriculum level, mothers reported that suburban teachers often extended extra efforts to help their children catch up with the class.<sup>16</sup> Initial concerns that these children would not be accepted were unsupported by the evidence.<sup>17</sup>

## III. RECENT RESEARCH

To improve upon the design and data quality of the earlier work, more recent research used administrative data to locate recent addresses for a 50% random sample of *Gautreaux* movers who had relocated before 1990, as well as track residential and economic outcomes for mothers.<sup>18</sup> In that study, multiple census measures helped to characterize neighborhoods, and regression models included a more comprehensive accounting for preprogram characteristics. The use of administrative records permitted us to locate 1504 of 1507 families,<sup>19</sup> and we found that 66% of suburban families remained in the suburbs an average of

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12. *Id.*

13. *Id.* at 307-08.

14. *Id.*

15. James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL'Y DEBATE 231, 248 (1995).

16. *See id.* at 240.

17. *See id.* at 246.

18. DeLuca & Rosenbaum, *supra* note 8, at 315.

19. *Id.* at 317.

fifteen years after placement.<sup>20</sup> After premove individual and neighborhood attributes were controlled, the racial composition of placement neighborhoods predicted racial composition of current neighborhoods.<sup>21</sup> Later analyses of this data showed that mothers continued to live in areas with much lower poverty rates and higher household incomes.<sup>22</sup>

Individual level economic outcomes, such as welfare receipt, employment, and earnings, were also influenced by the income and racial characteristics of placement neighborhoods. Women who moved to racially mixed or predominantly white neighborhoods with higher levels of socioeconomic resources did better than their counterparts in areas with low resources and high levels of black residents.<sup>23</sup> Research on the children of the original *Gautreaux* families has demonstrated that the neighborhoods where they resided in the late 1990s were substantially more integrated than their overwhelmingly minority origin neighborhoods.<sup>24</sup> However, relocating to lower poverty, more integrated areas had a mixed effect on the delinquent behaviors and arrest rates of boys versus girls. Suburban boys were much less likely to become involved in the criminal justice system, while girls who moved to the suburbs were more likely to be convicted for criminal offenses.<sup>25</sup>

#### IV. HOW DID GAUTREAUX “WORK”?

The findings described above focus on the advances made in recent quantitative work. We employed techniques to approximate the assessment of *Gautreaux* as a “treatment”—a social intervention with effects we might measure with statistical corrections and design comparisons. The stories *Gautreaux* participants tell about their experiences can contribute greatly to our understanding. The long-term family outcomes we observed appear to be significantly linked to the mobility program and the characteristics of the placement neighborhoods. However, administrative data cannot tell us *how* these outcomes occurred or the mechanisms through which neighborhoods have their impact. This is a problem common to neighborhood research, and one that makes improving mobility programs especially difficult. However, in several

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20. *Id.* at 318.

21. *Id.* at 316.

22. See Micere Keels et al., *Fifteen Years Later: Can Residential Mobility Programs Provide a Long-Term Escape from Neighborhood Segregation, Crime, and Poverty?*, 42 DEMOGRAPHY 51 (2005) [hereinafter Keels et al., *Fifteen Years Later*].

23. Ruby Mendenhall et al., *Neighborhood Resources, Racial Segregation, and Economic Mobility: Results from the Gautreaux Program*, 35 SOC. SCI. RES. 892, 914 (2006).

24. See Micere Keels, *Effects of Participation in a Residential Mobility Program on Children’s Long-Term Residential Attainment: Escape from Neighborhood Segregation, Poverty and Crime* (Working Paper, 2007) [hereinafter Keels, *Residential Attainment*].

25. Micere Keels, *Second-Generation Effects of Chicago’s Gautreaux Residential Mobility Program on Children’s Participation in Crime* 36-37 (Working Paper, 2007) [hereinafter Keels, *Second-Generation Effects*].

qualitative studies,<sup>26</sup> we analyzed interviews with mothers who described how these neighborhoods helped improve their lives and the lives of their children. Was it a matter of just increasing access to better resources, or was it necessary to interact with neighbors to obtain the full benefit of these new resources?

We analyzed interviews with nearly 150 *Gautreaux* mothers and found that after the move they described a new a sense of efficacy and control over their lives and that the major changes in their environments helped them to see that they had the ability to make improvements in their lives.<sup>27</sup> Certain features of the new suburban neighborhoods changed their perception of what was possible. Specifically, the women reported that they felt better about having an address in the suburbs and not having to put down a public housing address on job applications.<sup>28</sup> Other women noted that by moving to areas with more white residents, they and their children got to know more white people, and racial stereotypes were debunked. One child whose only exposure to white people were those she saw on television reported that after moving, she discovered that not all whites looked like television actors.<sup>29</sup>

Social interactions with whites allowed some of these women to feel that they had more social and cultural know-how and feel much less intimidated by future contexts in which they might have to interact with whites.<sup>30</sup> Additionally, working through some of the initial difficulties of the transitions to the suburbs allowed these women to realize that they could handle manageable challenges along the way to better jobs and more schooling. In comparison, the drugs or gang violence in their old city neighborhoods seemed to be forces too big for them to control and therefore permanent impediments to the advancements they were trying to make in their lives.<sup>31</sup> These findings suggest to us that one's repertoire of capabilities can vary depending on the type of neighborhood in which one lives and works.

Many of the mothers we interviewed also noted that they had to change their way of behaving to comply with the social norms of the new neighborhoods.<sup>32</sup> Several women noted initial difficulties in adjusting to suburban norms, which were unfamiliar and intolerant of some of their prior behaviors.<sup>33</sup> These mothers, who had lived all their lives in housing projects where these norms did not exist,

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26. See James E. Rosenbaum et al., *How Do Places Matter? The Geography of Opportunity, Self-Efficacy and a Look Inside the Black Box of Residential Mobility*, 17 HOUSING STUD. 71 (2002) [hereinafter Rosenbaum et al., *How Do Places Matter?*]; James Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 150 (Xavier de Souza Briggs ed., 2005) [hereinafter Rosenbaum et al., *New Capabilities in New Places*].

27. Rosenbaum et al., *How Do Places Matter?*, *supra* note 26, at 76.

28. *Id.* at 77.

29. *Id.* at 78.

30. *Id.* at 77-78.

31. *Id.* at 76.

32. Rosenbaum et al., *New Capabilities in New Places*, *supra* note 26, at 159-63.

33. *Id.*

saw benefits to complying with these expectations, and they decided to adopt them.<sup>34</sup> Ironically, some of these normative constraints, such as low tolerance for drugs and parties, were liberating because the trade-off was community safety.<sup>35</sup> This meant that mothers did not have to spend all their time watching their children, and these norms allowed mothers to give their children more freedom.<sup>36</sup>

Similarly, mothers reported social responsiveness from their neighbors. They received the benefits of reciprocal relations related to child care and neighbors' general concern and watchfulness in promoting the safety of their children, their property, and themselves.<sup>37</sup> They were also given favors in terms of transportation and some acts of charity.<sup>38</sup> It is remarkable that these new residents, who generally differed in race and class from their neighbors, were awarded this collective generosity, and the interviews suggest that it may have been conditional on their showing a willingness to abide by community norms.<sup>39</sup>

Most important, the new suburban social contexts provided a form of capital that enhanced people's capabilities. Some mothers reported that they could count on neighbors if a child misbehaved or seemed at risk of getting into trouble, if a child was sick and could not attend school, or if there was some threat to their children, their apartments, or themselves.<sup>40</sup> This was not just interpersonal support; it was systemic, and enabled these mothers to take actions and make commitments that otherwise would be difficult or risky.<sup>41</sup> For instance, some mothers reported a willingness to take jobs because they could count on a neighbor to watch their child in case they were late getting home from work.<sup>42</sup> It is through some of these mechanisms—some social, some psychological—that we believe some *Gautreaux* families were able to permanently escape the contexts and consequences of segregated poverty and unsafe inner-city neighborhoods.

More recent interviews with *Gautreaux* mothers suggest that some aspects of the city-suburban divide were also important for shaping how the placement community affected their children's behavior.<sup>43</sup>

[C]ity movers placed in both moderate and low poverty neighborhood [sic] found that, although their immediate neighborhood was safe, the larger community to which their children had easy access, continued to be dangerous. In comparison, children of families placed in the suburbs had relatively little direct neighborhood exposure to drugs and illegal

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 172.

38. *Id.* at 172-73.

39. *Id.*

40. *Id.* at 173.

41. *Id.*

42. *Id.* at 169-70.

43. See Keels, *Second-Generation Effects*, *supra* note 25.

activities and attended higher performing public schools with greater financial and teacher resources.<sup>44</sup>

Interviews revealed that affluent suburban neighborhoods also had “substantially fewer opportunities for involvement in delinquent criminal activities” and gangs.<sup>45</sup>

#### V. WAS GAUTREAUX A SOCIAL EXPERIMENT?

Methodologically, we often rely on observational data and regression analyses to provide estimates of the “effect” of neighborhood contexts and interventions. These approaches have their weaknesses; it is complicated, if not impossible, to infer causal effects when we know that there are unobservable characteristics of families that lead not only to their selection of neighborhood, but also to the outcomes of interest. As a result, there has been an increased push to employ experimental designs to assign social and economic “treatments,” be they neighborhoods, school programs, or income subsidies.

Along these lines, the *Gautreaux* program resembled a quasi-experiment. Although the program was not designed as an experiment and families were not formally randomly assigned to conditions, aspects of the program administration break the link between family preferences and neighborhood placement. In principle, participants had choices about where they moved. In practice, qualifying rental units were secured by rental agents working for the *Gautreaux* program and offered to families according to their position on a waiting list, regardless of their locational preference. Although participants could refuse an offer, few did so because they were unlikely to ever get another. As a result, participants’ preferences for placement neighborhoods had relatively little to do with where they ended up moving, providing a degree of exogenous variability in neighborhood placement that undergirds *Gautreaux* research. Few significant differences were found between suburban and city movers’ individual characteristics, but premove neighborhood attributes show small, but statistically significant, differences on two of nine comparisons. This may indicate selection bias, although random assignment studies by the HUD-sponsored Moving to Opportunity (“MTO”) also find some substantial differences.<sup>46</sup> It is not clear whether the observed premove differences explain much of the outcome difference. For instance, while suburban movers came from *slightly* lower-poverty tracts than city movers (poverty rate of 40.6% versus 43.8%), they moved to census tracts with *dramatically* lower poverty rates (5.0% versus 27.3%).<sup>47</sup> While small (three percentage points) differences in initial neighborhoods may account for a portion of the outcome differences, it is hard

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44. *Id.* at 37.

45. *Id.*

46. See Lawrence F. Katz, *Boston Site Findings: The Early Impacts of Moving to Opportunity*, in *CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SCIENCE EXPERIMENT 182-83* (John Goering & Judith D. Feins eds., 2003).

47. See DeLuca & Rosenbaum, *supra* note 8.

to dismiss the possible influence of the vast differences in placement neighborhoods. Current papers have discussed these issues at length and examine multiple neighborhood level indicators, detailed preprogram neighborhood differences, and intergenerational effects.<sup>48</sup>

In contrast, MTO was an experiment with the random assignment of low-income families to three conditions: an experimental group (who moved to low-poverty census tracts), an open-choice Housing Voucher group, and a “no move” control group. MTO was developed to formally test the *Gautreaux* findings with more rigorous design and pre/post move data collection.

Unfortunately, while MTO was a stronger study, it was a weaker “neighborhood change treatment” in some respects. The *Gautreaux* program moved nearly all families more than ten miles away from their original neighborhood (an average of twenty-five miles) to radically different labor markets. Eighty-eight percent of children from the *Gautreaux* program attended schools with above-average achievement and nearly all were too far away to interact with prior friends. They made new friends in the suburbs because they could not easily interact with their old friends in the housing projects.

In contrast, MTO moved nearly all families short distances (less than ten miles), mostly in the city. Few children attended schools with above-average achievement (10%), and many children continued interacting with old friends. In addition, MTO occurred in the hot labor market of the late 1990s, and large numbers of families in the control group moved out of high-rise housing projects through the federal Hope VI program. Therefore, the control group was experiencing unusual benefits and atypical circumstances which pose an unusually high standard of comparison so that the results may not generalize to more ordinary times.

While early *Gautreaux* analyses showed that suburban children attended much better schools and enjoyed improvements in educational outcomes relative to the city movers, the MTO program did not have such an effect on educational outcomes. Compared to the control group, the MTO treatment group showed no difference in test scores, school dropout rates, or self-reported measures of school engagement an average five years after random assignment.<sup>49</sup> This was due in part to the fact that many MTO experimental families sent their children to schools in the same school district (often the same schools), and even when they changed schools, the new schools were not much better than the original schools.<sup>50</sup>

While *Gautreaux* was associated with gains in mothers’ employment, the

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48. See *id.*; Stefanie DeLuca et al., *Gautreaux Mothers and Their Children: An Update*, 19 HOUSING POL’Y DEBATE (forthcoming 2008); Keels et al., *Fifteen Years Later*, *supra* note 22; Keels, *Residential Attainment*, *supra* note 24; Keels, *Second-Generation Effects*, *supra* note 25; Mendenhall et al., *supra* note 23.

49. Lisa Sanbonmatsu et al., *Neighborhoods and Academic Achievement: Results from Moving to Opportunity Experiment* 27 (Nat’l Bureau of Econ. Research, Working Paper No. W11909, 2006), available at [http://www.nber.org/~kling/mto/mto\\_ed.pdf](http://www.nber.org/~kling/mto/mto_ed.pdf).

50. *Id.* at 30-31.

MTO treatment group showed no impact compared with the control group—both groups showed large gains of comparable magnitude.<sup>51</sup> However, MTO outcomes were measured in the late 1990s, during a strong labor market and strong welfare reform, so, although MTO found no difference between groups, it found an extraordinary 100% employment gain for the control group. One possible interpretation is that virtually everyone who could work was doing so, and residential moves had no additional effect.

Despite the shorter moves and less change in social environment, both *Gautreaux* and MTO found large effects on mothers' and children's feelings of safety. MTO also showed significant reductions in depression and obesity among mothers and daughters (but no difference for sons). *Gautreaux* studied neither of these outcomes.

When comparing the two programs, it is crucial to understand the nature of the comparisons that are being made. Although social scientists have been concerned with learning about the likely benefits of certain kinds of neighborhood moves, what policy makers need to know is how a family fares when a program offers them the opportunity to move to a lower-poverty or less segregated neighborhood relative to what would have happened to that family had it not been given that opportunity. *Gautreaux* research studies can only compare subgroups of families that moved in conjunction with the program and experienced variation in neighborhood contexts. There is no comparison group of similar families who did not move as part of the program. MTO's evaluation design is much stronger because it tracked the fortunes of a randomly assigned control group of families who expressed interest in the program, but, owing to the luck of the draw, were not assigned to the move (although some managed to move on their own). At the same time, however, unlike MTO, *Gautreaux* can inform us about what happens when families move long distances to radically different neighborhoods, moves which changed their social context in terms of racial integration, poverty, school quality, labor market strength, and safety. While studies from both programs indicate how powerful the effects of residential moves can be for some families, the differences in findings indicate the importance of program design features, historical context influences, and concurrent policy effects. For example, alternative forms of mobility, such as those under the involuntary conditions of HOPE VI, may have different results.

Currently, we have the chance to further examine some of these questions and the continued viability of mobility programs. Researchers are planning a ten-year follow up to MTO to see whether some of the early improvements have more substantial long-term benefits. For example, the reduction in stress among the MTO movers might translate over time into stable employment prospects and better outcomes for their children. In Baltimore, the second author is following families who are moving as part of a partial desegregation remedy to a court case filed in 1995—a case very similar to *Gautreaux*. In *Thompson v. U.S. Department of Housing and Urban Development*,<sup>52</sup> a federal judge found the

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51. DeLuca & Rosenbaum, *supra* note 8, at 314.

52. 348 F. Supp. 2d 398 (D. Md. 2005).

Department of Housing and Urban Development responsible for violating fair housing laws by not looking beyond city limits for ways to house poor families and awarded two thousand vouchers to be used in low poverty, less segregated neighborhoods in the Baltimore region.<sup>53</sup> At the moment, over one thousand former public housing families have successfully relocated to safer, more opportunity rich communities. There are also extensive multi-partner efforts in place to help connect these families to employment and education resources in their new communities. For example, the Baltimore Regional Housing Coalition ("BRHC") is trying to expand a city-based job-counseling program to include suburban employers and a subset of the *Thompson* movers. Another program, funded by the Abell Foundation and the Baltimore Housing Authority, provides cars and low cost financing for *Thompson* families working in the suburbs. Additionally, the BRHC is proposing a way for housing counselors to assess families' health needs and help them develop a plan for improvement. Time will tell whether these new programs and evaluations will make the implications of housing mobility programs clearer.

Many policy reforms have tried to improve individuals' education or employability while they remain in the same poor schools or labor markets, but these reforms have often failed. Such policies may be fighting an uphill battle as long as families remain in the same social contexts and opportunity structures. In contrast, *Gautreaux* findings suggest that housing policy is one possible lever to assist poor families, moving them into much better neighborhoods with much better schools and labor markets. The initial gains in neighborhood quality that many of the *Gautreaux* families achieved persisted for at least one to two decades. The *Gautreaux* findings suggest that it is possible for low-income black families to make permanent escapes from neighborhoods with concentrated racial segregation, crime, and poverty and that these moves are associated with large significant gains in education, employment, and racially integrated friendships, particularly for children. However, as the MTO findings suggest, there is much that we still need to learn about what kinds of moves are required to make major changes in outcomes, and, like MTO, strong research designs will be needed to remove alternative interpretations.

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53. *Id.* at 463-64.

# NON-VIOLENT DIRECT ACTION AND THE LEGISLATIVE PROCESS: THE CHICAGO FREEDOM MOVEMENT AND THE FEDERAL FAIR HOUSING ACT

LEONARD S. RUBINOWITZ\*  
KATHRYN SHELTON\*\*

If out of [the Chicago Freedom Movement] came a fair housing bill, just as we got a public accommodations bill out of Birmingham and a right to vote out of Selma, the Chicago movement was a success, and a documented success.

Jesse Jackson<sup>1</sup>

## INTRODUCTION

Fresh from the success of the 1965 Selma, Alabama, voting rights campaign and the passage of the landmark Voting Rights Act, Martin Luther King and the Southern Christian Leadership Conference (“SCLC”) decided to take their Southern civil rights movement north to Chicago.<sup>2</sup> Dr. King and the SCLC joined forces with local Chicago activists to launch the Chicago Freedom Movement (“CFM”).<sup>3</sup> The Southern civil rights activists decided that the Movement needed to address racism and poverty in the urban North and selected Chicago as the first site of this new initiative. The objectives to be achieved and the strategies and tactics to be employed remained to be determined.

By the middle of 1966, the CFM decided to target racial discrimination and segregation in Chicago’s housing market.<sup>4</sup> That summer witnessed a direct action campaign aimed at white neighborhoods that excluded Blacks<sup>5</sup>—starting

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1. *The Chicago Freedom Movement—Activists Sound Off* (Chicago Public Radio broadcast Aug. 23, 2006) (on file with the Indiana Law Review), available at [http://audio.wbez.org/848/2006/08/848\\_20060823c.mp3](http://audio.wbez.org/848/2006/08/848_20060823c.mp3).

2. ALAN B. ANDERSON & GEORGE W. PICKERING, CONFRONTING THE COLOR LINE: THE BROKEN PROMISE OF THE CIVIL RIGHTS MOVEMENT IN CHICAGO 162, 172-73 (1986); TAYLOR BRANCH, AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965-68, at 321 (2006); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 442-44 (1986) [hereinafter GARROW, BEARING THE CROSS]; JAMES R. RALPH, JR., NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT 1 (1993).

3. RALPH, *supra* note 2, at 1, 54-55.

4. *See infra* Part I.C-D.

5. “Black” is capitalized whenever it refers to Black people, to indicate that Blacks, or African Americans, make up a specific cultural group with its own history, traditions, experience,

with testing for racial discrimination and vigils at real estate brokers' offices and escalating into a series of marches into white neighborhoods to dramatize their exclusionary character.<sup>6</sup> The leaders hoped that their Chicago initiative would also provide a model for similar campaigns in other Northern cities.<sup>7</sup>

This Article focuses on yet another goal of the CFM—to raise the nation's awareness about the problem of housing discrimination and to press Congress to enact the pending corrective legislation.<sup>8</sup> The Article argues that the CFM contributed to both the initial failure in 1966, and the final success in 1968, of the effort to secure passage of a federal fair housing law.<sup>9</sup> Ironically, the Movement made an unlikely prospect—passage of fair housing legislation in 1966—even more unlikely.<sup>10</sup> However, in 1968, Congress managed to enact a fair housing law.<sup>11</sup> This time around, the CFM contributed to the bill's surprising passage.<sup>12</sup> This Article will show how, through a series of indirect effects, the CFM contributed to the bill's passage, notwithstanding its contrary impact two years earlier.<sup>13</sup>

Part I provides background on the purposes and strategies of the CFM. Part II examines the CFM's impact on the unsuccessful effort to enact fair housing legislation in 1966. Finally, Part III assesses the indirect effects of the Chicago Movement in helping to facilitate the enactment of the Fair Housing Act in 1968.

## I. THE CFM

### A. Why Go North?

Martin Luther King saw racial discrimination as a national problem.<sup>14</sup> Racism in the North had manifested itself in overt and covert discriminatory

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and identity—not just people of a particular color. Using the uppercase letter signifies recognition of the culture, as it does with Latinos, Asian Americans, or Native Americans. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Litigation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

6. Mary Lou Finley, *The Open Housing Marches: Chicago, Summer '66*, in CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET 1, 19-24 (David J. Garrow ed., 1989) [hereinafter CHICAGO 1966]; RALPH, *supra* note 2, at 114, 117, 119.

7. ANDERSON & PICKERING, *supra* note 2, at 183.

8. *See infra* Part I.C.

9. Some activists, such as Jesse Jackson, claim that the CFM contributed to the passage of the Fair Housing Act in 1968. James Ralph, a key historian of the Movement, makes a similar argument. James Ralph, *Assessing the Chicago Freedom Movement*, POVERTY & RACE, May/June 2006 [hereinafter *Assessing the Chicago Freedom Movement*].

10. *See infra* Part II.

11. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)).

12. *See infra* Part III.

13. *See infra* Part III.

14. GARROW, BEARING THE CROSS, *supra* note 2, at 452.

policies and practices, rather than unjust laws; however, the Northern racism had effects just as devastating as the Jim Crow laws and customs of the South.<sup>15</sup>

Dr. King envisioned the civil rights movement as a national movement rather than a regional one.<sup>16</sup> While its roots were in the South, King's larger vision included creating a national movement to address the racial inequality that pervaded American society.<sup>17</sup> That meant an ideological shift, away from attacking the legal segregation of the South to focusing on the poverty, living conditions, and segregation of Blacks in the Northern cities.<sup>18</sup> King viewed a Northern campaign as a logical next step in the organization's efforts to apply its Southern strategies and tactics to the rest of the country.<sup>19</sup> At the same time, the SCLC had lost some of its momentum and direction after Selma.<sup>20</sup> After its voting rights success, the organization found itself searching for a new direction.<sup>21</sup> For King, the new direction was north, where he could make the case to the public and to those in power locally and nationally that race was an American problem.

The reality of the conditions for Blacks in the urban north became evident to the country in the summer of 1965, when the Los Angeles community of Watts erupted in violence.<sup>22</sup> The Watts rebellion demonstrated dramatically that eliminating the formal barriers of discrimination in the South left the problems

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15. ANDERSON & PICKERING, *supra* note 2, at 2; *Program of the Chicago Freedom Movement* (July, 1966), in CHICAGO 1966, *supra* note 6, at 97-98.

16. GARROW, BEARING THE CROSS, *supra* note 2, at 452 (noting that King said that "the movement had to transform itself from a southern to a countrywide effort"); RALPH, *supra* note 2, at 31. King felt a moral duty to address racism at the national level. *Id.* at 33. Additionally, as SCLC's efforts had always included an eye toward encouraging federal action, taking the movement national also seemed a natural step. See ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE & MARTIN LUTHER KING, JR. 7 (1987).

17. BRANCH, *supra* note 2, at 319-21; GARROW, BEARING THE CROSS, *supra* note 2, at 430, 452; RALPH, *supra* note 2, at 29-34.

18. See ANDERSON & PICKERING, *supra* note 2, at 153; BRANCH, *supra* note 2, at 282, 319-20; GARROW, BEARING THE CROSS, *supra* note 2, at 430, 452; RALPH, *supra* note 2, at 29-32; Finley, *supra* note 6, at 1, 1.

19. See ANDERSON & PICKERING, *supra* note 2, at 153; BRANCH, *supra* note 2, at 319-20; GARROW, BEARING THE CROSS, *supra* note 2, at 430, 452-53; RALPH, *supra* note 2, at 29-32; Finley, *supra* note 6, at 1, 1.

20. RALPH, *supra* note 2, at 33; FAIRCLOUGH, *supra* note 16, at 253-55.

21. ANDERSON & PICKERING, *supra* note 2, at 150; LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 9-10 (1967).

22. BRANCH, *supra* note 2, at 284-85, 288-89. "In August . . . , a police stop . . . escalated into six days of chaos that left thirty-four people dead, nine hundred injured, and four thousand arrested." CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 77 (2006). Fourteen-thousand National Guard members joined with several thousand local police to get the situation under control. *Id.*

of race and poverty that beset the rest of the country untouched.<sup>23</sup> The violence in Watts convinced Martin Luther King that he needed to take his movement to the urban North and demonstrate that non-violence could be effective there.<sup>24</sup>

Still, the idea of taking the movement north had its detractors within SCLC.<sup>25</sup> They argued that a Northern movement would face opponents who were more sophisticated than the Southern law enforcement officials whose violent reactions to the civil rights marches garnered nationwide support for activists.<sup>26</sup> In addition, SCLC's fundraising base, which was primarily Northern, would suffer if the movement left the South.<sup>27</sup> The SCLC's supporters could have been offended at the thought that they, or their communities, were being accused of racial discrimination. The organization's proven recruitment base was in the South, thus a Northern initiative might face greater uncertainty on the recruiting front as well.<sup>28</sup>

Still other concerns revolved around the perceived unfinished business in the South. Some SCLC activists thought there was too much work left to be done in the South, including voter registration initiatives to make the promise of the hard-won Voting Rights Act of 1965 into a reality.<sup>29</sup>

### *B. Why Chicago?*

Having decided that it was time for an initial foray into a Northern city, King and his SCLC colleagues spent much of the summer of 1965 visiting potential sites for their first Northern movement.<sup>30</sup> That summer witnessed exploratory

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23. GARROW, BEARING THE CROSS, *supra* note 2, at 439; Ronald E. Shaw, *A Final Push for National Legislation: The Chicago Freedom Movement*, *J. ILL. ST. HIST. SOC'*Y 304, 317 (2001).

24. BRANCH, *supra* note 2, at 319; RALPH, *supra* note 2, at 31-32, 38-39. King came to believe that SCLC made a mistake in neglecting the cities of the North. ADAM COHEN & ELIZABETH TAYLOR, AMERICAN PHARAOH—MAYOR RICHARD J. DALEY: HIS BATTLE FOR CHICAGO AND THE NATION 347 (2000).

25. The skeptics included King's close advisor Bayard Rustin and union leader Don Slaiman, the Executive Director of the AFL-CIO. BRANCH, *supra* note 2, at 320.

26. GARROW, BEARING THE CROSS, *supra* note 2, at 437.

27. BRANCH, *supra* note 2, at 320.

28. *Id.*

29. Bayard Rustin argued that the passage of that legislation made it imperative for SCLC to keep its focus on the South. "He urged King to go 'from city to city, and from county to county, leading people into voter registration centers.'" JOHN D'EMILIO, LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN 454 (2003).

Rustin believed that "SCLC's special mission [was] to transform the eleven southern states." COHEN & TAYLOR, *supra* note 24, at 330. He also believed, that "[t]here [would not] be any real change in American politics and the American social situation until that [was] done." *Id.* Andrew Young expressed skepticism that the Justice Department would take the steps to make the legal changes a reality on the ground. *Id.* Young also cautioned that the organization's limited resources could not support the move North while maintaining a presence in the South. *Id.*

30. GARROW, BEARING THE CROSS, *supra* note 2, at 435-37; RALPH, *supra* note 2, at 34-38.

trips to Cleveland, Philadelphia, and Washington, D.C., as well as Chicago.<sup>31</sup> Chicago soon emerged as the most attractive possibility, due to its own appealing aspects as well as the shortcomings of the other options that the SCLC considered.<sup>32</sup>

Chicago seemed to epitomize the urgent problems of urban poverty and racial segregation that drew Dr. King's attention to the North in the first place.<sup>33</sup> It represented the plight and challenges of Northern cities—writ large.<sup>34</sup> The city's size and extreme segregation made it an appealing site for the initial Northern thrust.<sup>35</sup> Moreover, Chicago's segregation made the city ripe for creating opportunities for the kind of confrontations and drama that had been the source of much of SCLC's Southern success.<sup>36</sup>

King believed that change in Chicago could serve as a catalyst for action in other Northern cities, leading to major changes elsewhere.<sup>37</sup> He hoped to create a pattern for action in Chicago that could be replicated in other Northern cities.<sup>38</sup>

King wanted to demonstrate that nonviolent tactics could work in the North, while also raising the consciousness of the nation about racism and its consequences there.<sup>39</sup> He hoped "that Chicago . . . could well become the metropolis where a meaningful nonviolent movement could arouse the

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31. RALPH, *supra* note 2, at 34-39. Local Black politicians in New York and Philadelphia quickly made clear their opposition to the movement choosing their cities. *Id.* at 35-36. King did not even visit New York, after a local Black leader, Adam Clayton Powell, informed reporters that the local Black leadership did not need King. BRANCH, *supra* note 2, at 321; GARROW, BEARING THE CROSS, *supra* note 2, at 435; RALPH, *supra* note 2, at 35.

Cecil B. Moore, President of the Philadelphia NAACP, cautioned that a visit from King would merely "divide the black community." See RALPH, *supra* note 2, at 36, 39; GARROW, BEARING THE CROSS, *supra* note 2, at 435. Though local King supporters convinced Moore to invite King to Philadelphia, and King did ultimately visit the city that summer, he knew that Moore's volatility made the city an unwise choice. RALPH, *supra* note 2, at 36. Cleveland was not large enough, and Washington was an "imprudent" pick, given the strained relationship between King and the White House. *Id.* at 39.

32. ANDERSON & PICKERING, *supra* note 2, at 143-44, 197; RALPH, *supra* note 2, at 39.

33. RALPH, *supra* note 2, at 39.

34. *Id.*

35. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 47 tbl. 2.3 (1993); RALPH, *supra* note 2, at 39. In 1959, the U.S. Civil Rights Commission called Chicago the country's "most residentially segregated large city." COHEN & TAYLOR, *supra* note 24, at 347.

36. See ANDERSON & PICKERING, *supra* note 2, at 197; RALPH, *supra* note 2, at 39.

37. King suggested, "Chicago represents all the problems that you find in the major [metropolitan] areas of the country. . . . If we can break the system in Chicago, it can be broken any place in the country." ANDERSON & PICKERING, *supra* note 2, at 183.

38. ANDERSON & PICKERING, *supra* note 2, at 183; Shaw, *supra* note 23, at 318.

39. ANDERSON & PICKERING, *supra* note 2, at 183; GARROW, BEARING THE CROSS, *supra* note 2, at 444; Shaw, *supra* note 23, at 317-18; see also RALPH, *supra* note 2, at 105.

conscience of this nation to deal realistically with the northern ghetto.”<sup>40</sup> He believed that success in Chicago could bring significant national press and attention.<sup>41</sup>

Chicago also seemed to have the potential for mobilization of a major movement. King believed that local people wanted and needed his movement to come to the city. By the summer of 1965, he had already become familiar with the city. During the previous summer, King had participated in the Illinois Rally for Civil Rights at Soldier Field in Chicago.<sup>42</sup> The rally, held on June 21, two days after the passage of the Civil Rights Act of 1964, was meant to celebrate the new Act and encourage progress in civil rights in Illinois and Chicago, including integration of the city’s schools.<sup>43</sup> King delivered a speech to 75,000 people.<sup>44</sup> The rally was the largest civil rights gathering ever held in Chicago.<sup>45</sup>

King also received a very warm welcome from the public, including the Black community and local activists, during his July 1965 exploratory visit.<sup>46</sup> He spoke to large, enthusiastic crowds, and led a group protesting Chicago’s segregation on a march to City Hall.<sup>47</sup>

King found in the city what he believed to be a strong, experienced organizational base on which to build. Chicago had an active and experienced local movement that was eager to join forces with SCLC.<sup>48</sup> King was very impressed with the Coordinating Council of Community Organizations—known as CCCO or Triple C-O. This was a coalition of civil rights organizations, community groups, and church groups that for several years prior to King’s arrival protested Chicago’s “separate and unequal” schools.<sup>49</sup> These prior efforts

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40. GARROW, BEARING THE CROSS, *supra* note 2, at 444. King announced at an SCLC executive staff meeting on August 26, 1965, that the movement would go to Chicago. RALPH, *supra* note 2, at 38-39. He explained that “[t]he present mood dictates that we cannot wait.” *Id.* at 39.

41. See RALPH, *supra* note 2, at 39.

42. *Id.*

43. ANDERSON & PICKERING, *supra* note 2, at 138.

44. RALPH, *supra* note 2, at 39.

45. See ANDERSON & PICKERING, *supra* note 2, at 138.

46. RALPH, *supra* note 2, at 39.

47. GARROW, BEARING THE CROSS, *supra* note 2, at 433-34; see also RALPH, *supra* note 2, at 39.

48. GARROW, BEARING THE CROSS, *supra* note 2, at 434; RALPH, *supra* note 2, at 39-40; Mary Lou Finley, *The Open Housing Marches: Chicago, Summer '66*, in CHICAGO 1966, *supra* note 6, at 1, 2.

49. RALPH, *supra* note 2, at 14-28, 39-40; Finley, *supra* note 6, at 1, 2. King said that “[s]ince there is a vibrant, active movement alive [in Chicago], we felt that this was the first community in which we should work and start our visits in the north.” GARROW, BEARING THE CROSS, *supra* note 2, at 434.

For several years, CCCO had fought against school segregation in Chicago. After letters to the Board of Education, conversations with school officials, and testimony at public meetings

faced great resistance from school and city officials, and made very little progress as a result.<sup>50</sup> The organization's leaders hoped that Dr. King's reputation and organization would inject energy and experience into the movement to address the City's racial problems.<sup>51</sup> Both the presence of what appeared to be a well-developed organization and the persistent entreaties from its leaders to come to Chicago added to the city's appeal.<sup>52</sup>

Mayor Richard J. Daley's position as the city's leader also attracted King. Some aspects of Daley's record and rhetoric led King to believe that the Mayor could be persuaded to respond positively to the Movement's concerns.

Daley had demonstrated his support for SCLC's Southern civil rights movement. Andrew Young, Dr. King's chief aide, recalled that

one of SCLC's most successful fund-raisers had been held in Chicago with the sponsorship of Mayor Daley and Mahalia Jackson: [In this 1963 event,] SCLC took home virtually all the money that was contributed.<sup>[53]</sup> Daley and his operatives persuaded vendors not to charge us for

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gained no ground for the group, the organization turned to demonstrations, sit-ins, and boycotts. On October 22, 1963, CCCO sponsored a school boycott. ANDERSON & PICKERING, *supra* note 2, at 118-19. Nearly 225,000 youth stayed out of school—by far CCCO's largest protest. *Id.* at 119. However, the impressive boycott had little, if any, effect in changing school board policies or practices. *Id.* at 127-28.

Much of the CCCO's activism focused on the removal of School Superintendent Benjamin J. Willis, who was viewed with great suspicion by the Black community. However, his support among whites was so strong that when he offered his resignation in 1963, the white-dominated Board of Education refused it. A second CCCO boycott in February 1964, could not match the scale of the previous one. *Id.* at 133. As a result, CCCO began to lose some of its focus and zeal. *Id.* at 133-40.

50. The CCCO's efforts to desegregate Chicago's schools were met with significant resistance from both Superintendent Benjamin J. Willis and the Board of Education, primarily in the form of silence or outright refusal to discuss the concerns of Black Chicagoans. Even small concessions, such as a modest voluntary transfer plan, precipitated widespread white resistance, leading school officials to back off from their initiatives. ANDERSON & PICKERING, *supra* note 2, at 113, 116-17, 137, 142.

51. RALPH, *supra* note 2, at 7, 34. It was important to SCLC that local activists sought to join forces. King and his colleagues had learned hard lessons in the South about the importance of working closely with local leaders. COHEN & TAYLOR, *supra* note 24, at 347-48.

52. King and the SCLC were impressed with the CCCO's Chairman, Albert Raby, as well as with the vigorous movement in progress in Chicago. GARROW, BEARING THE CROSS, *supra* note 2, at 434; RALPH, *supra* note 2, at 39; Shaw, *supra* note 23, at 318. In addition, James Bevel, King's long-time trusted advisor and SCLC Director of Direct Action, had moved to Chicago to accept a post at a local church earlier that year. RALPH, *supra* note 2, at 40. King viewed the presence of someone who was an integral part of previous direct action movements as an important asset for a Chicago campaign. RALPH, *supra* note 2, at 40-42; Finley, *supra* note 6, at 1, 2.

53. Taylor Branch describes the celebratory event. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 805-06 (1988).

expenses. This was not the kind of thing Martin forgot.<sup>54</sup>

In 1965, Mayor Daley had even praised King publicly, stating that “all right-thinking Americans should support” King’s goals of ending poverty and discrimination, and emphasizing Daley’s own desire to end poverty, slums, discrimination, and segregation.<sup>55</sup> Daley also invited King to meet with him so he could show the visitor the City’s progress on civil rights.<sup>56</sup> However, on that trip King declined the invitation to meet with the mayor, citing his tightly-packed schedule.<sup>57</sup>

Daley had taken steps to further Blacks’ progress in the city. He supported Blacks for elective office and hired Blacks to patronage positions.<sup>58</sup> In addition, in 1963, Daley proposed, and the City Council passed, a local fair housing ordinance—another indication that he might be sympathetic to CFM’s concerns.<sup>59</sup>

King also believed that it was advantageous that Daley was such a strong Mayor who seemed to have the power to bring about significant change.<sup>60</sup> The mayor’s dominance represented a contrast to other Northern cities, where power was much more diffused.<sup>61</sup> With so much political power centralized in one person, King thought that persuading Daley to take action could bring about major changes in Chicago.<sup>62</sup> Mayor Daley’s power at the national level also presented the possibility that putting pressure on him would lead to pressure on officials in Washington to act.<sup>63</sup>

The idea of going to Chicago elicited substantial controversy within the movement. Bayard Rustin, one of King’s key advisors since the Montgomery bus boycott a decade earlier, believed that challenging Mayor Daley was naïve and ill-advised. He warned King:

You don’t know what Chicago is like. . . . There are powerful political

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54. ANDREW YOUNG, AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA 406 (1996).

55. ROGER BILES, RICHARD J. DALEY: POLITICS, RACE, AND THE GOVERNING OF CHICAGO 111 (1995) [hereinafter BILES, RICHARD J. DALEY]; COHEN & TAYLOR, *supra* note 24, at 340.

56. GARROW, BEARING THE CROSS, *supra* note 2, at 433.

57. *Id.*

58. COHEN & TAYLOR, *supra* note 24, at 359.

59. RALPH, *supra* note 2, at 279 n.68.

60. COHEN & TAYLOR, *supra* note 24, at 337-38; GARROW, BEARING THE CROSS, *supra* note 2, at 444; RALPH, *supra* note 2, at 39; Finley, *supra* note 6, at 1, 2.

61. BILES, RICHARD J. DALEY, *supra* note 55, at 119.

62. The Democratic political machine was so notoriously powerful that King believed that Daley and Chicago’s other leaders would have the ability to make needed changes, if they could just be convinced. GARROW, BEARING THE CROSS, *supra* note 2, at 444. King thought that success would be more likely in a city where the power was centralized in one person, rather than one like New York, where far more people would need to be convinced. COHEN & TAYLOR, *supra* note 24, at 337.

63. Finley, *supra* note 6, at 1, 13.

figures. You've got the Daley machine to deal with. . . . You've got problems . . . which you don't have in the little southern communities that you are accustomed to. . . . [T]here is no political vacuum in Chicago. . . . You're going to be wiped out.<sup>64</sup>

Others shared Rustin's view that Mayor Daley would be a major obstacle to progress.<sup>65</sup> He was a far more sophisticated adversary than those they encountered in the South.<sup>66</sup> He was not likely to counter demonstrations with violence that would give the Movement political and media victories, but would employ more subtle and effective defenses.

The challenges abounded. Chicago was far larger and more complex than any of the Southern cities in which the SCLC had worked.<sup>67</sup> The city's population of three million, one-third of whom were Black, dwarfed both the overall and Black populations of Southern cities like Selma and Birmingham.<sup>68</sup> Also, the city lacked the highly visible, legally and culturally embedded Jim Crow system that had provided an obvious target in the South.<sup>69</sup>

At least one key advisor, Andrew Young, expressed concern that Chicago's Black residents would not be receptive to King's non-violent campaign.<sup>70</sup> The Democratic machine held great sway in the city's Black community. Black City Council members and other elected officials displayed unwavering loyalty to the Daley machine, which also reached deep into the Black community with its thousands of patronage jobs.<sup>71</sup> Many Black churches also had close ties to the political establishment.<sup>72</sup>

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64. D'EMILIO, *supra* note 29, at 454; see COHEN & TAYLOR, *supra* note 24, at 330; GARROW, BEARING THE CROSS, *supra* note 2, at 455.

65. COHEN & TAYLOR, *supra* note 24, at 330; GARROW, *supra* note 2, at 455.

66. ANDERSON & PICKERING, *supra* note 2, at 183; see BRANCH, *supra* note 2, at 444. In fact, Daley's political sophistication created significant problems for the Movement. *See infra* notes 92-93 and accompanying text.

67. Chicago had nearly a million Black residents crammed into ghettos, primarily on the south and west sides of the city. FAIRCLOUGH, *supra* note 16, at 280. The sheer scale of a movement necessary to impact a city of that size made the challenge daunting. Also, rather than racist laws, Chicago had racist conditions in the form of "block by block housing segregation" and a neighborhood school system that created de facto segregation. ANDERSON & PICKERING, *supra* note 2, at 68.

68. BILES, RICHARD J. DALEY, *supra* note 55, at 119.

69. RALPH, *supra* note 2, at 98.

70. D'EMILIO, *supra* note 29, at 455.

71. BILES, RICHARD J. DALEY, *supra* note 55, at 119-20.

72. Cohen and Taylor suggested that many Blacks supported and appreciated Mayor Daley and did not want King to challenge him:

Daley, who needed black votes in a way that southern politicians did not, had handed out elected offices, patronage jobs, and money in the black community, and had singled out a few Dawsons and Metcalfs to represent blacks on a citywide level. These black leaders, and their armies of patronage workers, had a personal stake in the status quo,

Further, the frustrating experience of the previous several years' civil rights efforts provided additional cause for concern. The presence of CCCO's developed, active movement seemed to be an advantage to choosing Chicago; however, the fact that its efforts to combat school segregation had largely met with failure raised serious questions about the possibilities for bringing about change in the city.<sup>73</sup>

### C. Why Fair Housing?

When SCLC announced in September 1965, that it would join forces with the CCCO and form the "Chicago Freedom Movement," the organization's specific objectives and strategies remained to be determined.<sup>74</sup> Initially, most Chicago activists expected the new movement to continue to challenge the city's segregated and unequal schools.<sup>75</sup> However, it soon became clear that this effort had run its course. Boycotts, demonstrations, and litigation had met with little success.<sup>76</sup> In addition, Superintendent Benjamin Willis, whose intransigence had motivated much of the protest, announced that he was taking early retirement.<sup>77</sup> His departure from the scene dampened the urgency of that effort.<sup>78</sup>

More importantly, Black Chicagoans faced many other problems besides the separate and unequal schools, including housing, jobs, and other economic woes.<sup>79</sup> By the fall of 1965, the Movement defined its goals in very broad terms: to end slums and attack the segregation that pervaded the city.<sup>80</sup> It struggled to define more specific objectives and strategies to pursue those goals. Narrowing the Movement's efforts was especially difficult given the breadth of problems Black Chicagoans faced, as well as the challenge of convincing local groups and activists to come together around a single agenda and give up some of their own projects.<sup>81</sup>

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in a way that few blacks in Selma or Birmingham did.

COHEN & TAYLOR, *supra* note 24, at 359.

Bayard Rustin warned that "you've got the powerful black ministers who are going to be jealous of you coming in here." D'EMILIO, *supra* note 29, at 454.

73. See FAIRCLOUGH, *supra* note 16, at 283.

74. Finley, *supra* note 6, at 1, 3; see GARROW, BEARING THE CROSS, *supra* note 2, at 442-43.

75. ANDERSON & PICKERING, *supra* note 2, at 173.

76. *Id.* at 121; see BRANCH, *supra* note 2, at 506.

77. RALPH, *supra* note 2, at 98.

78. *Id.*

79. ANDERSON & PICKERING, *supra* note 2, at 173-89.

80. Though SCLC and CCCO came to view a system that bred slums and poverty, there was no overall action plan for the Movement. RALPH, *supra* note 2, at 50-51. Coalition members wanted to address a number of problems facing Northern cities, including education, housing, poverty, wages, and employment practices, in an effort to create a blueprint for change. ANDERSON & PICKERING, *supra* note 2, at 182-83. It quickly became clear that the scope of the Movement's goals was moving beyond basic civil rights to encompass human rights. *Id.* at 183.

81. ANDERSON & PICKERING, *supra* note 2, at 187; RALPH, *supra* note 2, at 95.

Slum conditions pervaded many of the city's Black neighborhoods.<sup>82</sup> Many Blacks were forced to live in "dingy, unsanitary apartments," which lacked heat and hot water, and were often rat infested.<sup>83</sup> For the privilege of living in such quarters, Blacks paid far more in rent than a family in a white neighborhood would pay for a comparable apartment.<sup>84</sup> This reality led to a plan at the beginning of 1966 to address the problem of economic exploitation by ridding the city of slums, which the Movement saw as representing most of the problems Blacks faced.<sup>85</sup> The first initiative aimed to organize residents of the city's West Side Black community into an "end slums" Movement.<sup>86</sup> It targeted local slum landlords and attempted to bring national attention to issues of poverty.<sup>87</sup>

Activists planned to move this campaign from organizing and mobilizing residents to staging small demonstrations and, eventually, substantial protests in May 1966.<sup>88</sup> However, as CFM began to realize just how much effort it would take to effectively organize the Black community, and as the self-imposed deadline of the summer of 1966 came closer, it became clear that a change of direction was required.<sup>89</sup>

The effort to address slum conditions had encountered both internal and external obstacles. Organizing low-income tenants was a slow, difficult process, even for professional community organizers.<sup>90</sup> The SCLC typically had a very different modus operandi—mobilizing large numbers of people for dramatic, short-term movements and then moving on to another community.<sup>91</sup>

At the same time, Mayor Daley announced his own anti-slums campaign, to pre-empt the slums issue by using local and federal funds to improve housing and living conditions enough to defuse public criticism.<sup>92</sup> Daley's rhetoric, as well

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82. ANDERSON & PICKERING, *supra* note 2, at 188-89; GARROW, BEARING THE CROSS, *supra* note 2, at 456, 461; *see* RALPH, *supra* note 2, at 43.

83. FAIRCLOUGH, *supra* note 16, at 284; GARROW, BEARING THE CROSS, *supra* note 2, at 461.

84. FAIRCLOUGH, *supra* note 16, at 284.

85. ANDERSON & PICKERING, *supra* note 2, at 188-89; GARROW, BEARING THE CROSS, *supra* note 2, at 456.

86. RALPH, *supra* note 2, at 50; *see* GARROW, BEARING THE CROSS, *supra* note 2, at 457.

87. NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA 363 (2005). In one of the more publicized events of the end of the slums movement, King and other CFM members took over a slum building, claiming trusteeship over the building with a plan to collect rent from tenants to fix up the building. ANDERSON & PICKERING, *supra* note 2, at 191; BRANCH, *supra* note 2, at 440-41. Unfortunately, the landlord turned out to be an ailing, elderly man who could not afford the upkeep, rather than a poster child for slum landlords. ANDERSON & PICKERING, *supra* note 2, at 191; BRANCH, *supra* note 2, at 441.

88. GARROW, BEARING THE CROSS, *supra* note 2, at 456-58; RALPH, *supra* note 2, at 43.

89. *See* RALPH, *supra* note 2, at 89; Finley, *supra* note 6, at 1, 6.

90. FAIRCLOUGH, *supra* note 16, at 288.

91. *Id.*

92. COHEN & TAYLOR, *supra* note 24, at 363; RALPH, *supra* note 2, at 86-87. Just as King

as his actions, were overshadowing the CFM's initiatives to address the problems of the slums.<sup>93</sup> The CFM would need to pursue a different strategy in order to move beyond Daley's shadow.

It was not until late June 1966, that the CFM leadership settled on challenging housing discrimination and segregation, which in turn forced large numbers of Blacks to live in slum conditions.<sup>94</sup> They would embark on an "Open City Campaign."<sup>95</sup> Fair housing would become the core of the Chicago campaign that summer because of the advantages it offered for a nonviolent, direct action movement.<sup>96</sup>

The problem of housing discrimination had deep roots and a pervasiveness and severity that made it highly visible. Chicago had a long and sad history of housing discrimination that confined Blacks into increasingly overcrowded areas—first, on the city's south side and later on the west side, with a small area on the near north side.<sup>97</sup> Real estate brokers played a central role in the process, beginning with an official policy adopted in 1917 of excluding Blacks from white

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announced the end of the slums program, Daley announced his own anti-slums campaign. COHEN & TAYLOR, *supra* note 24, at 363. Throughout CFM's efforts to dramatize the state of slums in Chicago, Daley made efforts to co-opt their arguments and undercut any drama. *Id.* Soon after King assumed trusteeship of a slum building, Daley reported on the results of his own anti-slums initiative and announced to the press that his team had visited 96,761 poor families and exterminated 1,675,941 rats in its efforts to clean up the slums. *Id.* at 369. Daley also sometimes scheduled his own events to coincide with the CFM public events in an attempt to overshadow the CFM. *See id.* at 501-02.

93. *See* RALPH, *supra* note 2, at 89.

94. *Id.* at 102. Dr. King foreshadowed his concern with segregated housing as early as March 24, 1965, when he spoke to supporters at the end of the voting rights march from Selma to Montgomery, Alabama: "Let us march on segregated housing until every ghetto of social and economic depression dissolves and Negroes and whites live side by side in decent, safe, and sanitary housing." MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 285 (Clayborne Carson ed., 1998).

95. ANDERSON & PICKERING, *supra* note 2, at 216.

96. Finley, *supra* note 6, at 1, 12, 14; *see* ANDERSON & PICKERING, *supra* note 2, at 201.

97. Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 *How. L.J.* 841, 898-900 (2005). Housing discrimination, in both private and public housing, was the "most dramatic, persistent, and pervasive form" of racism in Chicago. *Id.* at 898-99. "[S]upport for racial discrimination and residential segregation came from public officials, the housing industry . . . , and white citizens." *Id.* at 899. Blacks were denied access to predominantly white areas and attacked if they did manage to gain access. *Id.* The 1950s saw episodes of "extensive violence against Black families moving into . . . white neighborhoods," including a mob attacking and burning down the apartment building that a Black family had just moved into in all-white Cicero (a suburb adjacent to Chicago), bombings, acts of arson and attempted arson, and other terrorist incidents. *Id.* Such violence received national and international attention. *Id.*; *see generally* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO, 1940-1960 (1983); MASSEY & DENTON, *supra* note 35.

neighborhoods.<sup>98</sup> Subsequently, racially restrictive covenants became pervasive in large parts of the city.<sup>99</sup> Throughout the first two-thirds of the twentieth century, violence greeted many Blacks who dared to move into white neighborhoods.<sup>100</sup>

Moreover, a fair housing campaign held the potential to create drama and draw attention to Chicago's racism and its consequences.<sup>101</sup> Housing segregation was a volatile issue in Chicago that presented the potential for confrontation.<sup>102</sup> In Birmingham and Selma, confrontation and the attendant drama had been the key to the civil rights activists' success. King believed that a similar scenario was required in Chicago.<sup>103</sup>

Also, local activists had already identified significant problems in the housing sales and rental markets.<sup>104</sup> The American Friends Service Committee ("AFSC"), an organization devoted to pursuing social justice, had initiated an open housing project in the Chicago area. The AFSC tested real estate offices to determine whether they discriminated against Black customers.<sup>105</sup> The project found widespread, blatant racial discrimination, thus providing clear evidence on which to base the Movement.<sup>106</sup>

Movement leaders hoped that the housing issue would attract a broad base of support within the Black community. Housing discrimination existed in all parts of the housing market, so its impact cut across class and neighborhood lines.<sup>107</sup> Expanding Blacks' housing options could have other benefits, as well. In addition to improving housing conditions, moving into middle-class white neighborhoods could mean better schools and more access to jobs.<sup>108</sup>

While housing discrimination may not have been of central concern to much of Chicago's Black community, it did raise questions about basic human

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98. ANDERSON & PICKERING, *supra* note 2, at 46-47.

99. *Id.* at 48.

100. Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 346-47 (2001) (reviewing STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000)); *id.* app. at 416 (Appendix A. Housing-Related Crimes Committed by Whites Against Black Entrants); *see generally* MEYER, *supra*.

101. Finley, *supra* note 6, at 1, 9; *see* ANDERSON & PICKERING, *supra* note 2, at 203-04.

102. *See* GARROW, *BEARING THE CROSS*, *supra* note 2, at 498.

103. *See id.*

104. ANDERSON & PICKERING, *supra* note 2, at 196-201; FAIRCLOUGH, *supra* note 16, at 292; RALPH, *supra* note 2, at 99-102.

105. ANDERSON & PICKERING, *supra* note 2, at 198-99; RALPH, *supra* note 2, at 100-02.

106. ANDERSON & PICKERING, *supra* note 2, at 198-99; FAIRCLOUGH, *supra* note 16, at 292; RALPH, *supra* note 2, at 99, 101-02.

107. Lori G. Waite, *Overcoming Challenges and Obstacles to Social Movement Mobilization: The Case of the Chicago Freedom Movement* (1998) (unpublished Ph.D. dissertation, Northwestern University) (on file with author).

108. COHEN & TAYLOR, *supra* note 24, at 382.

dignity.<sup>109</sup> For some Movement leaders, focusing on Blacks' mistreatment by real estate brokers dramatized the failure of the system to accord Blacks their basic rights as human beings.<sup>110</sup> Additionally, open housing was more concrete than education or poverty and provided a clear target for the Movement.<sup>111</sup> Further, housing segregation in Chicago was the form of Northern racism that most closely resembled the overt nature of Southern racism, which was a known adversary for veterans of SCLC's earlier campaigns.<sup>112</sup>

King also favored the fair housing focus because of the possibility of helping to enact federal legislation.<sup>113</sup> Congress was debating President Johnson's fair housing bill at the time.<sup>114</sup> In the spring of 1966, King and other civil rights

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109. Finley, *supra* note 6, at 1, 8. Journalist Mike Royko said that "Chicagoans already knew about slums. Whites were indifferent and Negroes didn't have to be reminded where they lived." FAIRCLOUGH, *supra* note 16, at 290 (citing MIKE ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 143 (1988)).

110. Civil rights activists in other parts of the country also had other priorities than housing discrimination at that time. The Chicago Freedom Movement was one of only twelve of the 181 protests challenging segregation between 1966 and 1970 that targeted housing discrimination. BONASTIA, *supra* note 22, at 78.

111. According to Mary Lou Finley, assistant to James Bevel, Bevel thought that Black men needed to build confidence and to assert themselves as people deserving equal treatment. Finley, *supra* note 6, at 1, 7-8. To Bevel, fair housing was an example of a basic human right. *Id.* If Black men could take a stand on this issue and demand to be treated like human beings, they would build confidence to push them forward in the Movement and build on their success, feeding into subsequent movements. *Id.* at 8. Finley believed that Bevel had probably convinced Dr. King, and that King and Andrew Young sold the idea to CCCO at a meeting on the "demands" shortly before the July 10th rally. *Id.* at 7.

112. *See* BRANCH, *supra* note 2, at 507. King had encountered housing discrimination when he attended graduate school in Boston. GARROW, BEARING THE CROSS *supra* note 2, at 423. That experience may have affected his willingness to focus on fair housing in Chicago. *Id.*

113. As early as January 1966, SCLC had publicly pressed Congress for passage of open housing legislation. FAIRCLOUGH, *supra* note 16, at 285-86 (citing Press Release, Southern Christian Leadership Conference, The Chicago Plan (Jan. 7, 1966)).

114. On April 13, 1966, SCLC's Executive Board issued a statement: "SCLC therefore calls upon the Congress of the United States to enact compulsive federal fair housing legislation, prohibiting discrimination and segregation in the sale and rental of all housing accommodations, public and private." Shaw, *supra* note 23, at 319 (citing Minutes of Board Meeting, April 13, 1966, TD [photocopy], Southern Christian Leadership Conference, PMLK, 1954-1968, box 29, folder 6, KLAA).

115. H.R. 14765, 89th Cong. (1966), as presented in *Civil Rights, 1966: Hearing on H.R. 14765 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. (1966)

leaders met with President Johnson to discuss the bill.<sup>115</sup> The President invited the major civil rights leaders to the White House to solicit their help at a time when civil rights legislation did not seem to have the support or urgency of earlier bills.<sup>116</sup> Moreover, President Johnson recognized that fair housing legislation was different from, and more difficult than, anything he had proposed up to that point.<sup>117</sup>

From the outset of the discussions of housing discrimination as a target, King and others viewed national legislation as at least a secondary goal of the Movement.<sup>118</sup> When announcing the Chicago Plan, King stated, “[O]ur objectives in this movement are federal, state and local. On the federal level we would hope to get the kind of comprehensive legislation which would meet the problems of slum life across the nation.”<sup>119</sup> Just as the movement in Birmingham had influenced the introduction of the 1964 Civil Rights Act, and the Selma march had been instrumental in the passage of the Voting Rights Act in 1965, King hoped that the Chicago Movement’s shining a light on housing discrimination would lead to legislation that specifically addressed open housing, as well as other civil rights concerns affecting the urban North.<sup>120</sup> He described the connection: “Congress is debating this issue of open housing this session. You can present bodies or bring about creative tension to expose the problem most creatively.”<sup>121</sup> The connection between a local fight for open housing and

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[hereinafter *1966 House Hearings*]; HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 203, 255-59 (1990); RALPH, *supra* note 2, at 175.

115. KOTZ, *supra* note 87, at 367. According to a memorandum from Joseph Califano, Domestic Program Coordinator to Lyndon Johnson, U.S. President, March 16, 1966, King, Roy Wilkins, Whitney Young, Floyd McKissick, John Lewis, Dorothy Height, A. Philip Randolph, Joseph Rauh, Andy Biemiller, Clarence Mitchell, and Dave Brody were all confirmed for the meeting on March 18. Memorandum from Joseph Califano, Special Assistant for Domestic Affairs, to Lyndon Johnson, U.S. President (Mar. 16, 1966) (copy on file with the Indiana Law Review).

116. Memorandum from Nicholas Katzenbach, U.S. Attorney Gen., to Lyndon B. Johnson, U.S. President (Mar. 17, 1966) (copy on file with the Indiana Law Review).

117. *Id.*

118. FAIRCLOUGH, *supra* note 16, at 286; Waite, *supra* note 107, at 114. At a press conference on January 7, 1966, King said about Chicago that “[o]ur work will be aimed at Washington.” FAIRCLOUGH, *supra* note 16, at 286 (quoting Press Release, Martin Luther King, Jr., Southern Christian Leadership Conference, The Chicago Plan (Jan. 7, 1966)).

119. Shaw, *supra* note 23, at 318 (quoting Press Release, Martin Luther King, Jr., Southern Christian Leadership Council, The Chicago Plan (Jan. 7, 1966)). On July 11, in the first meeting with Mayor Daley after the kickoff of the campaign, the Mayor refused to “announce his support for President . . . Johnson’s civil rights bill that was pending in Congress.” BILES, RICHARD J. DALEY, *supra* note 55, at 124.

120. ANDERSON & PICKERING, *supra* note 2, at 190; FAIRCLOUGH, *supra* note 16, at 133.

121. ANDERSON & PICKERING, *supra* note 2, at 201. King made this point in a conversation with his aide, Andrew Young. *Id.*

the fair housing bill offered him an opportunity to impact federal legislation.<sup>122</sup> As Jesse Jackson suggested, “[The CFM] was an attempt to get the nation to make housing segregation illegal.”<sup>123</sup>

Thus, the CFM settled on the goal of an “Open City,” with fair housing as its primary objective.<sup>124</sup> Its official program announced that as of July 10th, “we shall cease to be accomplices to a housing system of discrimination, segregation, and degradation.”<sup>125</sup>

The Chicago activists considered fair housing to be at the center of many injustices faced by Black Chicagoans.<sup>126</sup> After the rally inaugurating the direct action campaign on July 10, designated “Freedom Sunday,” King and several thousand others marched to City Hall to post their list of demands there.<sup>127</sup> The local demands included appeals to the Mayor, City Council, Governor, real estate brokers, and others regarding open housing, employment, welfare, education, and political representation for Blacks in Chicago.<sup>128</sup> The program for the Movement also included a demand for the “[p]assage of the 1966 Civil Rights Act with a provision to make it illegal to discriminate in the sale or renting of property on the basis of race, color, creed, or national origin.”<sup>129</sup>

#### *D. Strategies and Tactics: From Vigils to Marches*

The CFM employed two major strategies. Initially, it targeted real estate brokers. Since the Movement’s leaders viewed real estate brokers as major culprits in perpetuating housing discrimination and segregation, they “tested” brokers in selected white neighborhoods to see if they would serve Black

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122. *Id.* at 190. CFM did not select that issue because of its priority in the minds of the city’s Black population. Finley, *supra* note 6, at 1, 7. At the time, many Black Chicagoans were most concerned with the struggles of daily life, such as finding jobs, coping with poverty, and enduring slum conditions. *Id.* at 8; *see* BONASTIA, *supra* note 22, at 78-79.

123. HENRY HAMPTON & STEVE FAYER, *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S*, at 308 (1991); *The Chicago Freedom Movement—Activists Sound Off*, *supra* note 1; *see* Shaw, *supra* note 23, at 328. Some civil rights historians have deemed the CFM a failure. ANDERSON & PICKERING, *supra* note 2, at 3.

124. ANDERSON & PICKERING, *supra* note 2, at 201.

125. *Id.* at 201-07. King announced the program and the housing initiative on July 10 to an estimated 23,000 at Soldier Field. COHEN & TAYLOR, *supra* note 24, at 384.

126. GARROW, *BEARING THE CROSS*, *supra* note 2, at 493; *see* Finley, *supra* note 6, at 1, 3-4.

127. BILES, RICHARD J. DALEY, *supra* note 55, at 123-24; *see* *Program of the Chicago Freedom Movement*, *supra* note 15, at 97, 104-09.

128. *Program of the Chicago Freedom Movement*, *supra* note 15, at 97, 104-09.

129. *Id.* at 106. King wanted a strong, effective bill. ANDERSON & PICKERING, *supra* note 2, at 278. When the House stripped the bill of much of its scope and coverage, King objected in strong terms, “The housing section is virtually meaningless . . . . It is so watered down that it will hardly do anything to undo the long-standing evil of housing discrimination in this country.” RALPH, *supra* note 2, at 179; *see also* ANDERSON & PICKERING, *supra* note 2, at 278.

customers.<sup>130</sup> Black and white “dummy” home seekers applied for the same units, so they could compare the results to determine whether there was evidence of racial discrimination.<sup>131</sup> They targeted blue collar neighborhoods where the homes were well-maintained yet fairly affordable.<sup>132</sup> The testers documented blatant discriminatory practices by brokers.<sup>133</sup> Armed with that evidence, activists initiated vigils at the offending real estate brokers’ offices and in local churches, as well as small marches and picnics in the surrounding neighborhoods.<sup>134</sup> While continuing to coordinate real estate testing, the Movement held vigils in July, which were met with little resistance, few hecklers, and modest press.<sup>135</sup> The campaign was receiving far less public attention than the Movement had hoped.<sup>136</sup> It had yet to encounter the kind of confrontation it needed to generate significant media coverage.<sup>137</sup>

In an effort to escalate the Movement, activists began a series of larger marches into white neighborhoods on the southwest and northwest sides of the city—neighborhoods that were at some distance from the Black community, where Black purchasers and renters were clearly unwelcome.<sup>138</sup> As in the marches in the Alabama cities of Birmingham in 1963 and Selma in 1965, the Chicago marchers were met with violent resistance; but this time the violence came from white bystanders, rather than the police.<sup>139</sup> Mayor Daley was determined not to turn the demonstrators into martyrs by using the force of the police against them; but marchers in Gage Park (on the city’s Southwest side), and later in Belmont-Cragin (on the Northwest side), encountered crowds throwing rocks, bottles, cherry bombs, pieces of coal, and even knives.<sup>140</sup> On occasion, white mobs burned, overturned, or pushed marchers’ parked cars into nearby bodies of water, such as the lagoon in Marquette Park.<sup>141</sup>

Though the Chicago police provided a buffer between the marchers and the

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130. RALPH, *supra* note 2, at 114.

131. FAIRCLOUGH, *supra* note 16, at 292.

132. RALPH, *supra* note 2, at 114, 116. Members of CFM tested real estate offices in Gage Park and Belmont-Cragin. *Id.*

133. FAIRCLOUGH, *supra* note 16, at 292.

134. RALPH, *supra* note 2, at 114-19. Testers in Gage Park reported at least seventy-eight instances of discrimination within four days. *Id.* at 114.

135. *Id.* at 114-19.

136. *Id.* at 119.

137. This according to Andrew Young, one of the SCLC’s chief organizers. *Id.*

138. *Id.* at 116.

139. *Id.* at 119-26, 188-91; Finley, *supra* note 6, at 1, 24.

140. ANDERSON & PICKERING, *supra* note 2, at 228; COHEN & TAYLOR, *supra* note 24, at 392-93; RALPH, *supra* note 2, at 120.

141. ANDERSON & PICKERING, *supra* note 2, at 220, 224; RALPH, *supra* note 2, at 120-21; Finley, *supra* note 6, at 1, 22. On July 31, Blacks drove to the protest site in Marquette Park. While the police protected the marchers, whites descended on the unattended vehicles, setting fifteen cars on fire, smashing windshields and windows of thirty cars, and pushing two cars into the park’s lagoon. BILES, RICHARD J. DALEY, *supra* note 55, at 127.

protesters, the marchers were still hit by objects thrown by the crowd.<sup>142</sup> Movement leader Andrew Young said that the violent white mobs were “in some ways . . . more frightening” than the opposition they faced in the South.<sup>143</sup>

As the marches continued to grow in size, with groups as large as 600 or 1500 demonstrators, so did the size of the mobs that greeted them, with one mob estimated at nearly 8000 people.<sup>144</sup> At a march in early August into Marquette Park—a white working-class neighborhood on the city’s southwest side—Dr. King was hit in the head and knocked to the ground by a rock, while bystanders shouted “Kill him, Kill him.”<sup>145</sup> King said that he had “never seen as much hatred and hostility on the part of so many people.”<sup>146</sup> This violence drew the national press to Chicago and produced horrific images on national television.<sup>147</sup> People across the country were once again exposed to the violence that peaceful civil rights demonstrators encountered.<sup>148</sup>

Locally, the marches had serious negative consequences for Mayor Daley.<sup>149</sup> For a powerful leader who viewed Chicago as “his” city, the demonstrations represented an unacceptable loss of his control of the city.<sup>150</sup> Outsiders threatened the order that he prized so highly.<sup>151</sup> With CFM carrying out multiple marches, the risk loomed that angry, violent white mobs could overpower the police and inflict serious casualties on the marchers.<sup>152</sup>

Moreover, the marches carried a substantial political cost for him. Blacks and working class ethnic whites constituted two of the major voting blocs that

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142. ANDERSON & PICKERING, *supra* note 2, at 228-29; KOTZ, *supra* note 87, at 366; RALPH, *supra* note 2, at 119-23.

143. RALPH, *supra* note 2, at 123.

144. *Id.* at 123, 128-29, 132; Finley, *supra* note 6, at 1, 20-23.

145. ANDERSON & PICKERING, *supra* note 2, at 228; RALPH, *supra* note 2, at 123.

146. RALPH, *supra* note 2, at 123.

147. BILES, RICHARD J. DALEY, *supra* note 55, at 128.

148. RALPH, *supra* note 2, at 92-93.

149. Daley objected to marches and demonstrations and believed that the political process was the way to make decisions. COHEN & TAYLOR, *supra* note 24, at 328. In one of CCCO’s 1965 school protest marches on City Hall, the police arrested 250 of the demonstrators. *Id.* When Daley and the School Board met with protest leaders on June 28, the Mayor pressed for negotiations around the table rather than demonstrations in the streets—a precursor of his position the following summer. *Id.* at 329.

150. *Id.* at 393-94. Apparently, Daley even became physically ill because of the toll the marches took on him. *Id.* at 340.

151. According to one Daley biography, the Mayor’s opposition to King was based on racial integration’s risks to the Democratic machine. *Id.* at 339. Blacks moving out of Black neighborhoods could have destabilized the political regime there, while also leading whites to flee to the suburbs. *Id.* White flight would have cut into another key component of the machine’s base. *Id.*

152. FAIRCLOUGH, *supra* note 16, at 300. Daley was a young man during Chicago’s race riot of 1919, and he must have been aware of the possibility of a repetition of that tragic event. *See generally* WILLIAM M. TUTTLE, JR., RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919 (1970).

helped bring him to office and keep him there.<sup>153</sup> The marches pitted these two crucial constituencies against each other, with potentially disastrous consequences for the Mayor.<sup>154</sup> White home owners criticized him for permitting the marches to continue and for the rough treatment they received at the hands of the police.<sup>155</sup> Providing police protection for the marchers aroused the ire of whites who viewed Daley as facilitating a Black invasion of their neighborhoods.<sup>156</sup> Anti-Daley placards began to appear along with the racist ones at the marches, and Democratic officials feared increasing defections from the party.<sup>157</sup>

There seemed to be no way out of this quandary for Daley as long as the marches continued.<sup>158</sup> Referring to the upcoming fall elections, Movement leader James Bevel asserted that “[e]very time we march, . . . Daley loses 10,000 votes—from the whites.”<sup>159</sup> A white precinct captain echoed the refrain that the civil rights activity was causing damage to the machine: “We lose white votes every time there’s an outburst like this.”<sup>160</sup> As a result, Daley received great pressure from home owners and from machine functionaries to find a way to stop the marches.<sup>161</sup>

In addition, hundreds of police officers were present for every march.<sup>162</sup> Mayor Daley claimed that this led to a dearth of police officers and a rising crime rate in other parts of the city.<sup>163</sup>

#### *E. Summit Meetings and Agreement*

By mid-August, several large marches had encountered mobs of thousands of angry, jeering, and violent onlookers.<sup>164</sup> Mayor Daley had become desperate to put an end to the disruption on the streets of his city.<sup>165</sup> He would soon use

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153. COHEN & TAYLOR, *supra* note 24, at 149.

154. *Id.* at 412-21.

155. BILES, RICHARD J. DALEY, *supra* note 55, at 128-29.

156. *Id.*

157. *Id.*

158. As much as he wanted the marches to stop, Daley knew that “issuing an order” to that effect or “having the police stop them forcibly” would play into the hands of CFM and advance their cause. COHEN & TAYLOR, *supra* note 24, at 394.

159. FAIRCLOUGH, *supra* note 16, at 299-300.

160. COHEN & TAYLOR, *supra* note 24, at 412-13. At the same time, some Blacks became radicalized to the point that they were prepared to break their ties to the machine. *Id.* at 413. Overall, the 1966 elections in Chicago and surrounding Cook County were disastrous for the Democrats, in part because of CFM. *Id.* at 426-27.

161. BILES, RICHARD J. DALEY, *supra* note 55, at 128-29; FAIRCLOUGH *supra* note 16, at 300.

162. ANDERSON & PICKERING, *supra* note 2, at 223-30; RALPH, *supra* note 2, at 165.

163. RALPH, *supra* note 2, at 164-65.

164. *Id.* at 119-47; ANDERSON & PICKERING, *supra* note 2, at 221-33.

165. FAIRCLOUGH, *supra* note 16, at 300.

whatever means were at his disposal to accomplish that objective.<sup>166</sup>

As a strategic step, Daley agreed to negotiate with the CFM.<sup>167</sup> He made very clear that his primary purpose in meeting with the Movement leaders and reaching an agreement with them was to end the marches.<sup>168</sup> The Chicago Conference on Religion and Race coordinated the so-called “summit” meeting, which convened on August 17, 1966.<sup>169</sup> Participants included the Mayor, his colleagues and advisors, CFM leaders, business leaders, and leaders of the Chicago Real Estate Board.<sup>170</sup> The Movement’s demands emphasized the cessation of discrimination by real estate brokers in the sale and rental of housing.<sup>171</sup>

The initial all-day meeting did not result in a negotiated agreement, in part because of the unwillingness of the real estate officials to make commitments on behalf of their members.<sup>172</sup> Fearing increasing white backlash and violence, the Mayor and his staff argued throughout the meeting for a suspension of the demonstrations; however, without an agreement on the actions to be taken, CFM representatives rejected these repeated requests.<sup>173</sup> A subcommittee was chosen to work on developing a proposed agreement to bring back to the whole body the

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166. *Id.* For example, Representative Roman Pucinski, one of Mayor Daley’s Chicago Democrats in Congress, met with President Johnson to ask him to meet with CFM leaders to persuade them to stop the marches. *Shaw, supra* note 23, at 324 (citing Basil Talbott Jr., *Demonstrate at Loop Real Estate Board*, CHI. SUN-TIMES, Aug. 11, 1966, at 4). Pucinski requested Johnson tell the CFM that the demonstrations would jeopardize the passage of additional civil rights legislation. *Id.*

167. FAIRCLOUGH, *supra* note 16, at 300; RALPH, *supra* note 2, at 149-50.

168. RALPH, *supra* note 2, at 158-60; John McKnight, *The Summit Negotiations: Chicago, August 17, 1966-August 26, 1966, in CHICAGO 1966*, *supra* note 6, at 111, 116, 132. John McKnight, who attended the meetings as a U.S. Civil Rights Commission observer, commented on Daley’s motives: “It never seemed to me that Daley was trying to figure out how to deal with the broader race and housing problems in Chicago. . . . It was about stopping the marches, which were tearing at the heart of the Democratic Party.” COHEN & TAYLOR, *supra* note 24, at 402.

169. ANDERSON & PICKERING, *supra* note 2, at 237.

170. RALPH, *supra* note 2, at 149-52; Kathleen Connolly, *The Chicago Open-Housing Conference, in CHICAGO 1966*, *supra* note 6, at 49, 93-94.

171. ANDERSON & PICKERING, *supra* note 2, at 239; GARROW, BEARING THE CROSS, *supra* note 2, at 519; McKnight, *supra* note 168, at 111, 115. Other demands included enforcement of Chicago’s Fair Housing Ordinance and an end to construction of high-rise public housing developments limited to Black neighborhoods. ANDERSON & PICKERING, *supra* note 2, at 239. Mayor Daley’s response to King’s demands was to concentrate on whether satisfying the demands would lead to an immediate moratorium on marches. *Id.* at 240. King stated that the housing marches would likely stop, but marches to highlight issues like education and employment would not be included in any moratorium. *Id.* Daley quickly agreed in principle to those demands that directly affected him. *Id.*; BILES, RICHARD J. DALEY, *supra* note 55, at 130; COHEN & TAYLOR, *supra* note 24, at 404.

172. COHEN & TAYLOR, *supra* note 24, at 405-12.

173. *Id.* at 408-11.

following week.<sup>174</sup>

In the meantime, Mayor Daley sought and obtained an injunction limiting the number, size, and timing of the marches—one per day, with no more than 500 marchers, and during daylight hours.<sup>175</sup> Leaders of the CFM faced a very difficult choice, but they ultimately decided not to break the injunction.<sup>176</sup> Instead, on August 21 and August 23, King led individual marches into white neighborhoods on Chicago's southeast and southwest sides, thus complying with the injunction.<sup>177</sup>

On August 26, 1966, the parties reached what was later called the Summit Agreement, which included a commitment from the Chicago Commission on Human Relations to enforce the city's 1963 open housing ordinance, an agreement from Mayor Daley to advocate for state open occupancy legislation the following year, and a general agreement from the Chicago Real Estate Board "to withdraw its opposition to . . . open housing and to urge its members to obey the law."<sup>178</sup> The agreement did not contain any timetable for the various actions specified, nor did it include any enforcement provisions.<sup>179</sup> With the agreement, King announced the end of the marches—Mayor Daley's primary objective.<sup>180</sup> While Dr. King declared the agreement a "victory for justice," and the initial national media response was similarly positive, critics both within and outside the CFM considered it a sell-out and a failure.<sup>181</sup>

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174. ANDERSON & PICKERING, *supra* note 2, at 253.

175. BRANCH, *supra* note 2, at 518-19; GARROW, BEARING THE CROSS, *supra* note 2, at 516; RALPH, *supra* note 2, at 161.

176. COHEN & TAYLOR, *supra* note 24, at 415; GARROW, BEARING THE CROSS, *supra* note 2, at 516-17; RALPH, *supra* note 2, at 160. King feared that breaking the injunction would distract public attention from the open housing question. RALPH, *supra* note 2, at 162. He was also concerned that the overt unlawfulness would undermine the moral high ground taken by the Movement's non-violent, law-abiding strategy. *Id.* As a pragmatist, he also realized that many of his supporters were middle-class people who would not be willing to go to jail. *Id.* Moreover, any such effort would put a serious strain on the Movement's limited financial resources. The Movement's attorneys also strongly recommended complying with the injunction. GARROW, BEARING THE CROSS, *supra* note 2, at 515. Finally, King was becoming increasingly tired from his whirlwind schedule and myriad of responsibilities. *Id.* at 515.

177. BILES, RICHARD J. DALEY, *supra* note 55, at 133.

178. ANDERSON & PICKERING, *supra* note 2, at 272.

179. See KOTZ, *supra* note 87, at 367 (describing settlement as "toothless set of pledges").

180. BILES, RICHARD J. DALEY, *supra* note 55, at 133.

181. ANDERSON & PICKERING, *supra* note 2, at 268; BILES, RICHARD J. DALEY, *supra* note 55, at 133-35. Many local Black activists felt that the agreement had sold out the Black people of Chicago to the city administration. GARROW, BEARING THE CROSS, *supra* note 2, at 524. Critics complained that the agreement was little more than pledges of non-discrimination with no real commitments. FAIRCLOUGH, *supra* note 16, at 303. They were especially concerned that the agreement included no timetable for implementing the elements of the agreement and no enforcement provisions. *Id.* Still, the agreement was stronger than the one in Birmingham.

As with the Birmingham agreement negotiated three years earlier that identified modest initial steps to be taken to desegregate the city, the Summit Agreement focused entirely on local actions.<sup>182</sup> At the same time, there was the possibility that the events on the streets of Chicago could raise national awareness of the problem of housing discrimination and help bring about legislative action in Washington, as they had with Birmingham and Selma.<sup>183</sup> King continued to hold out hope that Congress would respond to the Chicago marches by passing fair housing legislation.<sup>184</sup>

There was nothing in the Summit Agreement itself that would have provided the basis for hope about federal legislation, but the precedents of Birmingham and Selma contributing to the pressure on Congress may have led King to think that the same dynamic might work after Chicago. The Birmingham experience was perhaps the most relevant for King, since the explicit goals there were local, the agreement was both local and modest, and the violence that the demonstrators encountered provided an impetus for Congress to act.

## II. 1966: THE CFM AND THE PROSPECTS FOR ENACTING FAIR HOUSING LEGISLATION

In 1965, Martin Luther King wrote:

The goal of the demonstrations in Selma, as elsewhere, is to dramatize the existence of injustice and to bring about the presence of justice by methods of nonviolence. Long years of experience indicate to us that Negroes can achieve this goal when four things occur: 1. Nonviolent demonstrators go into the streets to exercise their constitutional rights. 2. Racists resist by unleashing violence against them. 3. Americans of conscience in the name of decency demand federal intervention and legislation. 4. The administration, under mass pressure, initiates measures of immediate intervention and remedial legislation.<sup>185</sup>

King's explanation of his strategy in Selma sounds like a blueprint for the CFM's efforts to create the pressure that would lead to passage of federal fair housing legislation in 1966. That fall, while speaking in Washington, D.C., King reiterated that "[w]e need civil rights legislation," and emphasized the fair

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BRANCH, *supra* note 2, at 558.

182. The Birmingham Truce Agreement reached between movement leaders and Birmingham's merchants, included the desegregation of the city's stores, improved employment opportunities for Blacks, and established a Committee on Racial Problems and Employment. GARROW, BEARING THE CROSS, *supra* note 2, at 258-59.

183. See *supra* notes 101-03 and accompanying text.

184. KOTZ, *supra* note 87, at 367.

185. Martin Luther King, Jr., *Behind the Selma March*, SATURDAY REV., Apr. 3, 1965, at 16-17, 57, reprinted in A TESTAMENT OF HOPE 127 (James Melvin Washington ed., 1986).

housing bill President Johnson had proposed earlier that year.<sup>186</sup>

In early 1966, Johnson asked Congress to enact fair housing legislation as part of a larger civil rights package.<sup>187</sup> In April, he introduced the bill to the same Congress that had passed the landmark Voting Rights Act the year before.<sup>188</sup> Yet the new bill was unsuccessful in both 1966 and 1967.<sup>189</sup> In 1966, the House passed a modest fair housing bill that covered about forty percent of the nation's housing.<sup>190</sup> In the Senate, the President's proposal encountered the Southern filibuster that had greeted his initiatives the previous two years.<sup>191</sup> However, unlike the Civil Rights Act of 1964 and the Voting Rights Act, the effort to invoke cloture to end the filibuster and bring the bill to a vote of the full Senate failed. The bill died.<sup>192</sup>

With or without the CFM, fair housing legislation faced an extremely uphill battle in 1966. The CFM could not build sufficient public and political support to overcome the obstacles the bill faced.<sup>193</sup> In fact, the Chicago Movement made matters worse, reducing still further the chances of passage that year.

#### *A. The Obstacles*

By 1966, public support for civil rights had waned.<sup>194</sup> Some thought that the

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186. GARROW, BEARING THE CROSS, *supra* note 2, at 536.

187. *1966 House Hearings*, *supra* note 114, at 1048; Lyndon B. Johnson, U.S. President, State of the Union (Jan. 12, 1966).

188. The Civil Rights Bill of 1966 was introduced long before the November elections that resulted in significant Republican gains and Democratic losses in both the House and Senate. *See* GRAHAM, *supra* note 114, at 260.

189. *Civil Rights-Open Housing, 1966 Legislative Chronology*, in CONGRESS AND THE NATION, 1965-1968, at 365, 373 (1969) [hereinafter *1966 Legislative Chronology*].

190. GRAHAM, *supra* note 114, at 261; JAMES C. HARVEY, BLACK CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION 38 (1973); *see* H.R. 14765, 89th Cong. (1966); RALPH, *supra* note 2, at 174.

The bill passed the House on August 9, 1966. GRAHAM, *supra* note 114, at 261. Amendments to the bill exempted owner-occupied buildings that housed less than four families, among other exemptions, which effectively meant the bill would only cover large apartment buildings and developments. *1966 Legislative Chronology*, *supra* note 189, at 370; HARVEY, *supra*, at 38; Charles McC. Mathias, Jr. & Marlon Morris, *Fair Housing Legislation: Not an Easy Row to Hoe*, CITYSCAPE, 1999, at 21, 22-23.

191. GRAHAM, *supra* note 114, at 255; *see* 42 U.S.C. § 2000 (2000); *id.* § 1973; *Civil Rights, 1945-1964 Legislative Chronology*, in CONGRESS AND THE NATION, 1945-1964, at 1615, 1636-37 (1965); *Voting Rights, 1965 Legislative Chronology*, in CONGRESS AND THE NATION, 1965-1968, at 356, 359-60 (1969).

192. The bill never even made it to the floor of the Senate. A two-week filibuster of a motion to consider the bill ended with supporters conceding defeat on September 19, 1966. *1966 Legislative Chronology*, *supra* note 189, at 373; *see infra* notes 316-48 and accompanying text.

193. RALPH, *supra* note 2, at 174-75, 184, 186.

194. *Id.* at 184-86.

country had already gone too far in responding to Black protests.<sup>195</sup> Much of this attitude shift stemmed from white resistance to efforts to desegregate the North, as well as growing frustration with urban riots and hostility toward the growing Black Power movement.<sup>196</sup>

As the civil rights movement migrated north, many white Northerners chose not to support it. Even many of those who opposed the formal Jim Crow system of racial segregation in the South had little sympathy for challenges to systemic racism in their own backyard.<sup>197</sup> The civil rights movement also lost support due to urban disorders in a number of cities, as well as the emergence of the Black Power movement with its powerful rhetoric.<sup>198</sup>

Fair housing legislation faced particularly tough sledding because of the national scope of the bill. Previous civil rights statutes primarily affected the South and, as a result, legislators and their constituents in much of the country were largely unaffected by their passage.<sup>199</sup> At that time, housing discrimination and segregation were more pervasive outside the South.<sup>200</sup> If anything, fair housing legislation would have a greater impact in the North and West than in the South. That made the bill especially controversial. Worse yet, 1966 was an election year, a time when members of Congress are least likely to take on controversial matters.

Much of the organized pressure on Congress aligned itself against passage of fair housing legislation. The National Association of Real Estate Boards (“NAREB”) carried out an aggressive and effective lobbying campaign against the bill.<sup>201</sup> NAREB included about 83,000 real estate brokers, accounting for about ninety percent of the country’s real estate transactions.<sup>202</sup> The organization distributed large numbers of leaflets and put together a major letter writing initiative to members of Congress in opposition to the bill.<sup>203</sup> Largely as a result of that effort, Congressional mail ran dramatically against open housing

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195. RALPH, *supra* note 2, at 184, 186. “By 1966, [seventy] percent of whites [thought] that ‘Negroes were trying to move too fast.’” Mara S. Sidney, *Images of Race, Class, and Markets: Rethinking the Origin of U.S. Fair Housing Policy*, 13 J. POL’Y HIST. 181, 188 (2001) (quoting JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 281 (1968)).

196. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 38 (1988) [hereinafter KERNER REPORT]; RALPH, *supra* note 2, at 6, 186-88. Beginning in 1965, the nation witnessed “three consecutive summers of deadly [and costly] urban” rebellions in cities around the country. BONASTIA, *supra* note 22, at 77.

197. RALPH, *supra* note 2, at 186.

198. *Id.* at 184, 186; see BRANCH, *supra* note 2, at 531-32.

199. Rubinowitz & Alsheik, *supra* note 97, at 873-85.

200. *Id.*

201. RALPH, *supra* note 2, at 175, 184, 186.

202. BONASTIA, *supra* note 22, at 80.

203. *Id.*

legislation.<sup>204</sup>

While the House managed to overcome these obstacles to pass a bill—albeit a very weak one—the filibuster in the Senate prevented a full Senate vote. Senate Minority Leader Everett Dirksen, a Republican of Illinois, who had facilitated cloture in 1964 and again in 1965, stood firmly opposed to fair housing legislation.<sup>205</sup> That ended the matter for 1966.

### *B. CFM's Lack of Significant Positive Impact*

Perhaps for some of the reasons discussed in Part A, the white violence that greeted the CFM did not generate the powerful public outrage and political momentum that had come from the brutality against peaceful demonstrators in Birmingham and Selma.<sup>206</sup>

Both the Chicago violence itself and the public response to it were very different from the then-recent Southern experience. In Birmingham and Selma, Alabama, law enforcement officers—local police and state troopers—attacked the peaceful demonstrators.<sup>207</sup> In Birmingham, in 1963, Police Chief Bull Connor ordered fire hoses and police dogs set on the peaceful young demonstrators.<sup>208</sup> The graphic images in the media of those attacks helped build the public support required for passing the Civil Rights Act of 1964.<sup>209</sup>

Similarly, in 1965, voting rights activists in Selma sought media attention as a means of advancing their cause.<sup>210</sup> As the movement evolved, its centerpiece became a march from Selma to the state capitol in Montgomery to raise national consciousness about the exclusion of Blacks from the political process in the South and to create pressure on Congress to enact effective federal voting rights legislation.<sup>211</sup> As the marchers left Selma and reached the Edmund Pettus Bridge,

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204. *Id.*

205. Rubinowitz & Alsheik, *supra* note 97, at 896-901.

206. One commentator has suggested that while Congress was considering fair housing legislation in the summer of 1966, “[i]t does not appear . . . that the Chicago demonstrations inspired action in Washington.” BONASTIA, *supra* note 22, at 79.

207. See GARROW, BEARING THE CROSS, *supra* note 2, at 239-60, 379-99; GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 314-23, 380-88 (2006); *see generally* FAIRCLOUGH, *supra* note 16.

208. GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE 227 (1997); FAIRCLOUGH, *supra* note 16, at 126; GARROW, BEARING THE CROSS, *supra* note 2, at 239-40, 248.

209. See *infra* notes 256-59 and accompanying text for a discussion of President Johnson’s use of these images to press Congress to enact his bill.

210. ROBERTS & KLIBANOFF, *supra* note 207, at 384; *see* GARROW, BEARING THE CROSS, *supra* note 2, at 379.

211. BRANCH, *supra* note 2, at 47-52; DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 73-77 (1978) [hereinafter GARROW, PROTEST AT SELMA]; J. MILLS THORNTON III, DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA 487-88 (2002).

scores of uniformed state troopers—many on horseback—turned them back.<sup>212</sup> As the marchers knelt to pray before continuing on the march, the troopers surged forward and attacked them viciously with nightsticks, amidst clouds of tear gas.<sup>213</sup> The national media coverage of this violence shocked the nation and generated widespread public and political support for congressional action, thus contributing to the passage of President Johnson's proposed Voting Rights Act.<sup>214</sup>

In Chicago, private citizens—white neighborhood residents and their supporters—not police officers, were responsible for the violence against the demonstrators.<sup>215</sup> In contrast to the Alabama experience, Mayor Daley provided police protection for the marchers.<sup>216</sup> While the protection was often inadequate and the police arrested few of the whites who attacked the marchers, the police were at least formally on the side of the marchers.<sup>217</sup>

Mayor Daley's provision of police protection for the marchers weakened the moral force of the Movement's position.<sup>218</sup> In the South, it was very clear that the authorities were attacking peaceful citizens who were exercising their constitutional right to demonstrate. For many white Northerners, the housing marches in Chicago had far more ambiguous implications. They were peaceful demonstrations, but for many people they also constituted an “invasion” of working-class white communities that threatened the well being of those neighborhoods.<sup>219</sup> Violence and hostility directed at the marchers was often couched in the rhetoric of self-defense. Many whites blamed the protesters for seeking to foment unrest and for provoking violence.<sup>220</sup>

As the marches continued, white supremacist sentiment took hold in Chicago. In late August, members of the American Nazi Party, the National States Rights Party, and the Ku Klux Klan all traveled to Chicago to hold rallies.<sup>221</sup> Many white Chicagoans were shocked and angered by the influx of white supremacist groups; however, many blamed the civil rights activists for the sudden arrival of these unwelcome outsiders.<sup>222</sup> Local politicians, like the police superintendent who publicly blamed the city's unrest on the Black protesters,

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212. BRANCH, *supra* note 2, at 49.

213. *Id.* at 50-52; FAIRCLOUGH, *supra* note 16, at 242; JOHN LEWIS, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT 327-30 (1998); ROBERTS & KLIBANOFF, *supra* note 207, at 385-86.

214. ROBERTS & KLIBANOFF, *supra* note 207, at 384-88; see IRVING BERNSTEIN, GUNS OR BUTTER: THE PRESIDENCY OF LYNDON JOHNSON 241 (1996); GRAHAM, *supra* note 114, at 165-70; LYNDON BAINES JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF A PRESIDENCY 1963-1969, at 165 (1971) [hereinafter JOHNSON, THE VANTAGE POINT]; KOTZ, *supra* note 87, at 271.

215. RALPH, *supra* note 2, at 129.

216. *Id.*; COHEN & TAYLOR, *supra* note 24, at 364.

217. RALPH, *supra* note 2, at 188-89.

218. *Id.* at 141-42.

219. *Id.* at 188-89; see Rubinowitz & Perry, *supra* note 100, at 357-58.

220. RALPH, *supra* note 2, at 141.

221. *Id.* at 148-49, 164.

222. *Id.* at 164.

further stoked whites' anger.<sup>223</sup>

Moreover, the CFM did not generate the extensive national media attention that the movements in Birmingham and Selma had attracted.<sup>224</sup> That may have been attributable to the different strategies and tactics of the Southern and Chicago movements, as well as the white response to the respective initiatives.<sup>225</sup> The Southern movement had made use of dramatic tactics that provided local movements with a national audience.<sup>226</sup> In the South, King and many other demonstrators had gone to jail, thus garnering additional media attention. King himself, whether in jail or not, had been a strong draw.<sup>227</sup> Often, the media focused on events simply because of King's presence.<sup>228</sup>

In responding to the Southern movement, the media paid special attention to the violent response of Southern law enforcement and the influx of youth into the movement.<sup>229</sup> When Bull Connor turned the dogs and fire hoses on protesters in Birmingham, the national press reported widely on the incident.<sup>230</sup> The day that hundreds of Black youth first joined the movement also received extensive national press and attracted hundreds of new volunteers to the movement.<sup>231</sup> Birmingham quickly became front page news throughout the country.<sup>232</sup>

Attracting press had been a significant element of the movement's strategy in the South; however, there were fewer dramatic tactics and drastic measures designed to garner publicity in Chicago.<sup>233</sup> Neither King nor any of his followers went to jail.<sup>234</sup> Moreover, King was in Chicago only intermittently. He led only two marches, both of which attracted some of the most extensive press coverage

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223. *Id.*

224. *Id.* at 177-78. The Chicago marches made the front page of the *New York Times* only seven times in their twenty-seven days, compared to sixteen times in 1963 in Birmingham and thirty-five times in 1965 in Selma. *Id.* at 178.

225. *Id.* at 177.

226. *Id.* In Birmingham and Selma, hundreds of protesters were arrested, and images of arrested protesters standing in the courthouse made national headlines and aroused outrage throughout the country. ROBERTS & KLIBANOFF, *supra* note 207, at 380; see GARROW, BEARING THE CROSS, *supra* note 2, at 379-80. Additionally, the Southern movement actively encouraged people throughout the country, especially clergy, to join the protesters in the South. RALPH, *supra* note 2, at 177. The movement and its supporters fed and housed the thousands of protesters who traveled to Selma to participate in marches. *Id.*

227. RALPH, *supra* note 2, at 177.

228. *See id.*

229. *See* ROBERTS & KLIBANOFF, *supra* note 207, at 311-22.

230. *Id.* at 312, 318-19.

231. *Id.* at 314-15.

232. RALPH, *supra* note 2, at 178.

233. *Id.* at 177; *see* ROBERTS & KLIBANOFF, *supra* note 207, at 307-23, 380-88.

234. RALPH, *supra* note 2, at 177. King decided that they would not violate the injunction that the city obtained in August to limit the marches. *See supra* note 176 and accompanying text.

of any of the Chicago marches.<sup>235</sup> Further, the Movement made no real effort to attract participants from around the country, which might have brought additional media coverage.<sup>236</sup>

The lack of greater media attention may have reflected the lack of public support for the CFM, especially as compared to the national support the Southern movements generated in 1964 and 1965.<sup>237</sup> As whites in the North showed ambivalence toward civil rights activities in their own backyards—especially those raising the highly controversial issue of housing discrimination—the Northern media followed suit.

Initially, the media seemed sympathetic to the CFM.<sup>238</sup> However, as the Movement continued, the media not only failed to cover the Movement as extensively as the Southern demonstrations, it also became distinctly critical of King and his fellow activists.<sup>239</sup> As the marches became the Movement's primary tactic, the *Chicago Tribune* sympathized with the white homeowners and “disparaged the imported prophets of ‘nonviolence’” who the paper said had “baited” the homeowners during their marches.<sup>240</sup>

By the end of August, national media were also criticizing the Chicago Movement and calling for an end to the marches. During an appearance by King on the news show *Meet the Press* in late August, moderator Lawrence Spivak asked King, “Isn’t it time to stop demonstrations that create violence and discord?”<sup>241</sup> A few days later, the *New York Times* urged the Movement to agree to a moratorium on marches to stall “the present downhill course to nowhere.”<sup>242</sup>

The coincidence in timing of the CFM and the urban riots in Chicago and other Northern cities also distracted public attention from the violence that

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235. RALPH, *supra* note 2, at 177. On the other hand, King was not present at the Edmund Pettus Bridge in Selma when state troopers and local police attacked the marchers. LEWIS, *supra* note 213, at 324. His absence did not seem to detract from the national outrage that the violent resistance provoked. *See supra* note 214 and accompanying text.

236. RALPH, *supra* note 2, at 177-78. Ralph suggests that the Movement made no effort to attract marchers from beyond Chicago because Chicago already presented an interracial group of potential protesters. *Id.* at 177. Also, there may have been concern that if the Movement imported marchers and created more disruption in the city, Daley would have clamped down on the marches harder and sooner.

237. At the same time, there was substantial opposition outside of the South to the Southern movements. Jonathan L. Entin, *Viola Liuzzo and the Gendered Politics of Martyrdom*, 23 HARV. WOMEN'S L.J. 249, 262 & nn.103-04 (2000) (reviewing MARY STANTON, FROM SELMA TO SORROW: THE LIFE AND DEATH OF VIDA LIAZZO (1998)).

238. BILES, RICHARD J. DALEY, *supra* note 55, at 128.

239. *See* BRANCH, *supra* note 2, at 441, 521. The winter before the marches began, when King assumed trusteeship over a rat-infested slum building, the *New York Times* headline read “Dr. King Assailed for Slum Tactic.” *Dr. King Assailed for Slum Tactic—Takeover of Building Stirs Wide Chicago Opposition*, N.Y. TIMES, Feb. 25, 1966, at 18.

240. BRANCH, *supra* note 2, at 509.

241. *Id.* at 519 (quoting *Meet the Press* (NBC television broadcast Aug. 21, 1966)).

242. BRANCH, *supra* note 2, at 521.

Chicago's civil rights demonstrators encountered. Both the public and the media frequently conflated the riots and mob violence against peaceful marchers, holding Blacks responsible in both cases for the turmoil involved.<sup>243</sup> According to one historian, "A number of opponents [of the fair housing bill] implicitly used 'rioters' as a synonym for all African Americans."<sup>244</sup>

Consequently, the CFM was not able to stir the conscience of the nation in the same way that Birmingham and Selma had done.<sup>245</sup> The violence in Chicago did not lead Congress to sympathize with the goals of the Movement. In fact, there were very few references to the CFM in the 1966 hearings on the fair housing bill in either the House or the Senate.<sup>246</sup> Most of the references in the House hearings criticized the Movement.<sup>247</sup>

### *C. CFM's Negative Impact on the Drive for Fair Housing Legislation*

While other forces would almost certainly have prevented the passage of a fair housing bill in 1966, the CFM inadvertently further undermined the effort to pass the bill. The Movement's adverse impact seems attributable in large part to its initial decision to go north to Chicago and its subsequent strategic and tactical choices to shine the spotlight on housing discrimination there by marching into white neighborhoods.

1. *President Johnson, the CFM, and the Fair Housing Bill.*—President Johnson had used his official position as well as his exceptional political skills to push the Civil Rights Act of 1964 and the Voting Rights Act through Congress.<sup>248</sup> However, Johnson made no such concerted effort in 1966. Several

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243. RALPH, *supra* note 2, at 186, 193.

244. BONASTIA, *supra* note 22, at 83.

245. See RALPH, *supra* note 2, at 173.

246. *Id.* at 191-92. See, e.g., *Civil Rights: Hearings on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 1520 (1966) (statement of James Harvey) [hereinafter 1966 Senate Hearings] (lamenting the "tragic happenings in Chicago ...when a riotous mob of white people brutally attacked . . . [participants] in a nonviolent effort to open housing"); *Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. 421 (1967) (statement of Whitney Young) [hereinafter Civil Rights Act of 1967 Senate Hearings] (commenting on marches on Chicago, although he seems to be referring to marches into the suburbs); *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. 234 (1967) (written statement of Edward Rutledge) (giving credit to King and local Chicago leaders for dramatizing the issue of fair housing).

247. RALPH, *supra* note 2, at 191 & nn.53-54 (citing the remarks of Congress in the Congressional Record, among other sources).

248. Johnson's efforts included working closely with King to increase pressure on Congress to pass the Voting Rights Bill, as well as making public statements and privately lobbying members of Congress. JOHNSON, THE VANTAGE POINT, *supra* note 214, at 165; KOTZ, *supra* note 87, at 253,

key factors account for his relatively passive approach, including his preoccupation with the war in Vietnam, his declining popularity, the disruption caused by violence in major cities, and the decreasing public support for civil rights legislation in a congressional election year.<sup>249</sup> Additionally, the CFM contributed to the President's lack of engagement, largely because of his sharply contrasting relationships with the main protagonists—Mayor Richard J. Daley and Dr. Martin Luther King, Jr.

President Johnson took few steps publicly or privately to try to move the 1966 fair housing provisions through Congress.<sup>250</sup> He walked a fine line by proposing progressive legislation—maintaining his image as a civil rights supporter—but not putting his political weight behind it, which might have made it look as if he was controlled by civil rights leaders.<sup>251</sup> The events on the streets of Chicago contributed to Johnson's lack of aggressiveness in pursuing fair housing legislation.<sup>252</sup>

Unlike with Selma, President Johnson expressed no public support for the CFM.<sup>253</sup> Privately, he expressed strong opposition to the marches, and the

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368-70.

249. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 1961-1973*, at 443-44 (1998); JOHNSON, *THE VANTAGE POINT*, *supra* note 214, at 177; Memorandum from Henry Wilson to Lyndon B. Johnson (Mar. 11, 1966) (copy on file with Indiana Law Review).

250. Although Johnson did make some speeches in support of the 1966 civil rights bill, there is little evidence that he engaged in the behind-the-scenes persuasion of members of Congress that marked the passage of earlier civil rights legislation. Shaw, *supra* note 23, at 320.

251. *See KOTZ, supra* note 87, at 368-69.

252. The White House also expressed concern about the impact of the marches on the re-election chances of Illinois Senator Paul Douglas, a strong supporter of Johnson's "Great Society" programs. ANDERSON & PICKERING, *supra* note 2, at 270; RALPH, *supra* note 2, at 183. Since Douglas had a strong civil rights record, he was losing support to Republican candidate Charles Percy (also a supporter of civil rights legislation) in white neighborhoods where the marches were taking place. ANDERSON & PICKERING, *supra* note 2, at 270. The White House was so concerned that Attorney General Nicholas Katzenbach called King to emphasize the potential negative impact the marches might have on Douglas's campaign. RALPH, *supra* note 2, at 183.

253. When speaking in August of 1966 in the Northeast, Johnson's message focused on "the importance of [seeking] change through established channels" and actively criticized those who took the law into their own hands. RALPH, *supra* note 2, at 183. He made no direct statements against the CFM, but certainly expressed subtle disapproval. *Id.*; President Lyndon B. Johnson, Remarks at the University of Rhode Island Ceremony Awarding President Johnson an Honorary Degree (Aug. 20, 1966), *in CONG. Q.* 1932 (1966).

Johnson had his surrogate, Vice President Hubert Humphrey, a long-time civil rights supporter, call for an end to the marches. RALPH, *supra* note 2, at 183. On August 13, 1966, on *The Today Show*, Humphrey said, "People are sick and tired of violence and disorder." *Id.* To another reporter, he stated that demonstrators in Chicago had gone too far and were actually damaging the cause of social justice. *Id.*

When urging Congress to pass the Voting Rights Act, Johnson condemned the violence in

tensions and violence they provoked.<sup>254</sup> Johnson's response to the CFM reflected both his growing closeness to Chicago's Mayor Richard J. Daley and his increasing distance from Martin Luther King.<sup>255</sup>

a. *The Johnson-Daley connection.*—The close political and personal relationship between President Johnson and Chicago's Mayor Richard J. Daley precluded the possibility of the President repeating his earlier approach to arguing for civil rights legislation. In 1965, President Johnson made explicit reference to the police violence against voting rights marchers in Selma in urging that the country support, and Congress pass, the Voting Rights Act.<sup>256</sup> On March 15, Johnson spoke to Congress, condemning the violence in Selma, promising a voting rights bill, and associating himself with the Southern civil rights movement when he ended his speech with the civil rights battle cry, declaring "we . . . shall . . . overcome."<sup>257</sup> Johnson used similar tactics to ensure the passage of the 1964 Civil Rights Act in the wake of police violence against protesters in Birmingham.<sup>258</sup>

Thus, the President made good use of the violence perpetrated against non-violent civil rights demonstrators in arguing for the passage of civil rights legislation. He could have pointed once again to the repeated violence that the non-violent CFM's marchers encountered at the hands of whites in pressing for the passage of fair housing legislation.<sup>259</sup> He even could have ignored the fact that this time the police protected the marchers and the violence came at the hands of private citizens.

However, the political and personal implications of Selma and Chicago were vastly different for President Johnson. Even though local and state elected

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Selma, connecting the violence to a need to strike down restrictions to voting in all elections. JOHNSON, THE VANTAGE POINT, *supra* note 214, at 165. Johnson had seen a clear connection between King's efforts in Selma and the Voting Rights Act, taking time to speak by phone with King about the potential support for the Voting Rights Act while he was working on Selma. GRAHAM, *supra* note 114, at 162-63; KOTZ, *supra* note 86, at 250. After King's arrest, Johnson spoke to the press about the fundamental nature of the right to vote. GARROW, PROTEST AT SELMA, *supra* note 211, at 51-52.

254. BRANCH, *supra* note 2, at 506.

255. *See id.*

256. JOHNSON, THE VANTAGE POINT, *supra* note 214, at 165. Johnson used events in Selma to put political pressure on Congress to pass the Voting Rights Act, including getting cloture to end the filibuster by Southern senators and cooperating with King and NAACP lobbyist Clarence Mitchell, Jr., to develop a compromise bill that could pass the House. BRANCH, *supra* note 2, at 270; KOTZ, *supra* note 87, at 328, 331; RANDALL B. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION 586 (2006).

257. JOHNSON, THE VANTAGE POINT, *supra* note 214, at 165; *see* DALLEK, *supra* note 249, at 220. In a telephone conversation with King later that evening, Johnson suggested, "[Y]ou're the leader who's making it all possible, I'm just following along trying to do what's right." RICHARD N. GOODWIN, REMEMBERING AMERICA 310 (1988).

258. KOTZ, *supra* note 87, at 60-63.

259. *See supra* notes 139-48 and accompanying text.

officials in Alabama belonged to the President's party, he could attack the law enforcement leadership publicly with little short-term political cost. Not so with Chicago's Mayor Richard J. Daley, who was a crucial political ally and friend of the President.<sup>260</sup> It was inconceivable that Johnson would point to the violence inflicted on civil rights demonstrators in Chicago as a reason for enacting a fair housing law. If Johnson had highlighted the Chicago violence, he would have embarrassed and alienated Daley. Daley would have interpreted such statements as claims that his city was racist and that he, the Mayor, could not control its citizens.<sup>261</sup> Johnson did not want, nor could he afford, to risk disrupting his relationship with Daley.

Mayor Daley had received substantial credit—rightly or wrongly—for John Kennedy's narrow victory in 1960, which brought Lyndon Johnson into the White House as Vice-President.<sup>262</sup> Kennedy carried Illinois by a slim margin, and Daley was instrumental in Kennedy's win in the state.<sup>263</sup>

While Johnson probably knew that Daley had objected to Kennedy's selecting him as his running mate, he understood the mayor's political importance. As President, Johnson did not let that history interfere with a blossoming relationship with the Mayor. Upon assuming the presidency after Kennedy's assassination in November 1963, Johnson began his efforts to connect with Daley. He called the Mayor frequently, invited him to the White House, and asked him to sit with the first family during his initial speech to a joint session

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260. COHEN & TAYLOR, *supra* note 24, at 351-52. Though their relationship had a rocky start—Daley had initially discouraged John F. Kennedy from choosing Johnson as his running mate—once Johnson became President, he actively sought a rapport with Daley. *Id.* at 267-70, 310, 323-24; EUGENE KENNEDY, *HIMSELF! THE LIFE AND TIMES OF MAYOR RICHARD J. DALEY* 171 (1978). Eventually this rapport developed into a personal and political friendship. *See* MICHAEL R. BESCHLOSS, *TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES*, 1963-1964, at 323-24 (1997).

261. *See* COHEN & TAYLOR, *supra* note 24, at 351.

262. Daley had urged presidential candidate John F. Kennedy to pick someone other than Lyndon Johnson as his running mate in 1960. *Id.* at 260. Daley had helped Kennedy secure the Democratic nomination, so he thought that Kennedy should be responsive to his concern that Chicago Blacks would find the Democratic ticket less appealing with a Southerner on it, thus making it more difficult to win Illinois. *Id.* However, Kennedy selected Johnson because he thought that the Texan would help secure Southern votes. *Id.*

263. *See id.* at 260, 265. The Kennedy-Nixon election in 1960 was one of the closest in history, and Illinois was a key state in the race. *Id.* at 265. Kennedy won Chicago by a staggering margin of more than 456,000 votes, giving him Illinois. *Id.* The results remain shrouded in controversy, with allegations that the Daley forces committed voter fraud to ensure that Kennedy would carry the state. BILES, *RICHARD J. DALEY*, *supra* note 55, at 73-74. After months of the Chicago Democratic political machine working on Kennedy's behalf, on the night of the election, the race was close. *Id.* at 73. Near the end of the night, both parties released votes that they had been holding, and in the end Kennedy won Illinois. *Id.* Though the State Election Board unanimously certified the results, and an impartial investigation uncovered no voter fraud, the election results retained an air of mystery. *Id.* at 73-74.

of Congress.<sup>264</sup> Johnson further expressed his appreciation by inviting Daley to be a special guest at his inauguration.<sup>265</sup>

Over time, Lyndon Johnson and Richard Daley developed a mutual respect and a friendship. Their similar political and personal styles helped to cement the relationship. Both were loud, outspoken, and aggressive in their leadership.<sup>266</sup>

Moreover, Daley was undoubtedly the most powerful big city mayor in the country.<sup>267</sup> Johnson needed his support, and he worked hard to get it and then to maintain it. Daley actively supported Johnson's legislative agenda, while Johnson helped Daley get federal funding for Chicago—on Daley's terms.<sup>268</sup>

At the time of CFM's marches in Chicago, Johnson was contemplating a run for re-election, for which he would have needed Daley's strong support.<sup>269</sup> He "recognized that it would be politically insane for a Democratic President with

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264. COHEN & TAYLOR, *supra* note 24, at 310. Speaking to Daley in early 1964, Johnson stated, "I never forget how you treated me in the '60 thing and I always have a warm spot for you." BESCHLOSS, *supra* note 260, at 168.

During the same conversation, Johnson said "I'm a Dick Daley man." *Id.* Daley returned the compliment: "We're Johnson men because, by God, Mr. President. I really mean it. All I hear is everything wonderful about you. You're doing a great job and may the Lord continue to give you health to carry out the responsibilities the way you're doing." *Id.*

265. COHEN & TAYLOR, *supra* note 24, at 326. Johnson invited the Daleys to sit on the platform during the swearing-in ceremony and in the presidential box during the Inaugural Ball. *Id.* Daley was also chosen to introduce the President at one of the parties. *Id.*

266. As Lady Bird Johnson explains in her diary, her husband considered the Mayor "one of his favorite people . . . He's a very arch type of political boss, ruddy faced, emanating efficiency and friendliness." BESCHLOSS, *supra* note 260, at 323-24.

267. See BILES, RICHARD J. DALEY, *supra* note 55, at 148.

268. According to Joseph Califano, Johnson's domestic advisor,

Daley was critical to the success of the Great Society, [Johnson's major domestic initiative]. . . . A call to Daley was all that was needed to deliver the fourteen votes of the Illinois Democratic delegation. Johnson and others of us had made many calls to the Mayor and Daley had always come through.

COHEN & TAYLOR, *supra* note 24, at 351 (quoting BERNSTEIN, *supra* note 214, at 396).

In 1964, Chicago became one of the first cities in the country to develop a Community Action Program (CAP)—a Johnson initiative to provide funding to cities to alleviate poverty, which featured a requirement to include poor residents in decisionmaking. ANDERSON & PICKERING, *supra* note 2, at 170; COHEN & TAYLOR, *supra* note 24, at 316-18. However, it quickly became clear that CAP would survive in Chicago only if Daley ran it the way he wanted to, with little oversight and virtually no participation by poor residents. ANDERSON & PICKERING, *supra* note 2, at 170; COHEN & TAYLOR, *supra* note 24, 342-46. Though at least one congressman complained about Daley's ignoring the program's requirements, Johnson allowed Daley to run the program as he saw fit, regardless of the program's requirements. ANDERSON & PICKERING, *supra* note 2, at 170-71; COHEN & TAYLOR, *supra* note 24, at 316-18, 342-46. One program official said that "We had problems with Daley on *everything*, . . . and he always went to the White House, and always won." *Id.* at 344.

269. COHEN & TAYLOR, *supra* note 24, at 351.

aspirations for another term to meddle in a crisis in a city governed by the most powerful Democratic mayor in the country.”<sup>270</sup> He certainly did not want the Mayor to turn on him and oppose his re-election. Daley had already conveyed to the President his strong opposition to the Vietnam War; however, the Mayor never criticized the war publicly, out of his political loyalty.<sup>271</sup> Johnson did not want to risk endangering that loyalty, given the potentially disastrous political consequences.<sup>272</sup>

Consequently, Johnson would not have contemplated the use of even implicit criticism of Daley by pointing to the violent resistance to open housing demonstrations in Chicago as a reason for Congress to enact fair housing legislation. Any public statement by the President or any member of his administration during that summer about the need to address housing discrimination might have been understood by the public as an implicit reference to the Chicago situation.

Instead, Johnson privately supported Daley in his handling of the threats posed by the CFM.<sup>273</sup> As suggested earlier, CFM’s strategy and tactics raised the ire of Mayor Daley. The mayor shared with the President his anger and his frustration with the marches. During the course of the open housing marches in the summer of 1966, Daley and Johnson had a number of private telephone conversations about the events in the city.<sup>274</sup> Daley consistently criticized the Movement and told the President at one point that “[w]e stand for justice for all our people, and we also stand for law and order, and I’ll be damned if we let

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270. RALPH, *supra* note 2, at 182.

271. In a conversation with Johnson in 1966, Daley said of the war, “[W]hen you’ve got a losing hand in poker you just throw in your cards . . . . You put your prestige in your back pocket and walk away.” COHEN & TAYLOR, *supra* note 24, at 445-46.

272. Johnson worked hard to protect his relationship with Daley. In 1965, federal education officials had threatened to suspend education funds to Chicago as a result of CCCO’s civil rights complaint. ANDERSON & PICKERING, *supra* note 2, at 178; COHEN & TAYLOR, *supra* note 24, at 334. After investigating the allegations of segregation and unequal treatment in Chicago’s schools, Francis Keppel, the U.S. Commissioner of Education, found the schools likely to be in violation of the Civil Rights Act of 1964 and froze any award of federal funds to Chicago pending a full investigation. ANDERSON & PICKERING, *supra* note 2, at 179; COHEN & TAYLOR, *supra* note 24, at 349-52. Daley angrily complained to the President, and the funds flowed almost immediately. ANDERSON & PICKERING, *supra* note 2, at 180-81; COHEN & TAYLOR, *supra* note 24, at 351-52. President Johnson sought to redeem himself with the Mayor as quickly as he could. ANDERSON & PICKERING, *supra* note 2, at 180-81; COHEN & TAYLOR, *supra* note 24, at 349-52; see GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 151-207 (1969).

273. See *supra* notes 253-54 and accompanying text.

274. BRANCH, *supra* note 2, at 505-06. Daley also told Johnson that King was criticizing him publicly about Vietnam: “King’s rally . . . was fifty percent Johnson—‘Johnson’s a killer, Johnson’s a destroyer of human life, Johnson is a killer in Vietnam’ . . . . He [King] is not your friend. He’s against you on Vietnam. He’s a goddamn faker.” *Id.* at 505 (alteration in original).

anyone take over themselves the running of the city.”<sup>275</sup> On that occasion, Johnson replied, “You’re just as right as you can be, Dick, . . . [a]nd I’ll support you.”<sup>276</sup> Johnson repeatedly expressed his sympathy and support for Daley in the face of what the Mayor described as highly disruptive and costly demonstrations.<sup>277</sup>

*b. The Johnson-King disconnect.*—At the same time, the growing political and personal divide between President Johnson and Martin Luther King further adversely affected Johnson’s views about the CFM and his willingness to pursue fair housing legislation aggressively in its wake. Johnson and King worked together on both the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>278</sup> However, there was always a tension between them, in part because of their very different personality styles. Johnson was brash and outspoken, while King was soft-spoken and modest.<sup>279</sup>

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275. *Id.* at 506. In one of those conversations, Daley conflated King’s movement with gang violence. Others seemed to share his difficulty in separating the violence perpetrated on peaceful marchers from the violence involved in urban riots. Telephone Conversation Between Richard J. Daley, Mayor of Chicago, and Lyndon B. Johnson, U.S. President (July 19, 1966) (on file at Lyndon B. Johnson Presidential Library and Museum, WH6607.02.10414).

276. BRANCH, *supra* note 2, at 506. Johnson and King were not in contact during this period, so the President did not hear the civil rights leader’s perspective on the Chicago Movement. RALPH, *supra* note 2, at 182.

277. BRANCH, *supra* note 2, at 506. Less than a week later, the President reassured Daley again, saying “there’s nobody that loves you more than I do.” Telephone Conversation Between Richard J. Daley, Mayor of Chicago, and Lyndon B. Johnson, U.S. President (July 19, 1966) (on file at the Lyndon B. Johnson Presidential Library and Museum, WH6607.03.10423). In conversations with many politicians, Johnson did most of the talking. However, his reputation for arm-twisting, browbeating, and intimidation did not surface when he spoke with Mayor Daley. Instead, Johnson’s time on the phone with Daley was spent mostly in listening, as Daley relayed all of his hopes and woes for Chicago. Johnson said very little beyond expressing concern and support. *See Telephone Conversation Between Richard J. Daley, Mayor of Chicago, and Lyndon B. Johnson, U.S. President (July 19, 1966)* (on file with the Lyndon B. Johnson Presidential Library and Museum, WH6607.02.10414-15) (lasting more than twenty-two minutes). Years after Johnson’s presidency, Daley remembered, “I loved LBJ. There was nothing he wouldn’t do for Chicago.” FRANK SULLIVAN, *LEGEND: THE ONLY INSIDE STORY ABOUT MAYOR RICHARD DALEY* 175 (1989).

278. GRAHAM, *supra* note 114, at 162-63; KOTZ, *supra* note 87, at 189-90. King and Johnson had both considered the Voting Rights Bill an allied effort. KOTZ, *supra* note 87, at 253. At one point in Selma, over the telephone, Johnson advised King as to how to continue putting pressure on Congress, and King in turn advised Johnson on how to ensure the Black vote in the next election. *Id.*

279. RALPH, *supra* note 2, at 181. For many reasons, including their personality differences and different approaches to achieving civil rights progress, the relationship between King and Johnson never moved beyond formality. *Id.* King considered righting social injustices to be a moral imperative, while Johnson relied on legislative arguments and methods in pushing for civil

Johnson had always been more comfortable with civil rights leaders who worked with Congress and the Administration through traditional political channels—like Roy Wilkins and Clarence Mitchell, Jr. of the NAACP and Whitney Young of the Urban League.<sup>280</sup> Johnson understood the legislative process, perhaps better than any politician of his generation.<sup>281</sup> Johnson feared that demonstrations would lead to violence and negative political repercussions. He preferred the more predictable congressional lobbying.<sup>282</sup> He was much less comfortable with the confrontational direct action strategies that served as the hallmark of King’s approach to social change and with the trust in faith and religion underlying King’s movement.<sup>283</sup> Johnson even urged King during their first meeting to stop using demonstrations as a tactic.<sup>284</sup> Notwithstanding their differences, they maintained a mutually respectful and constructive—if somewhat distant—relationship during Johnson’s early years in the White House.<sup>285</sup>

However, by the time of the CFM in 1966, President Johnson had become increasingly disenchanted with King.<sup>286</sup> Mayor Daley knew about the tension between Johnson and King, and he exploited it in seeking the President’s support in the summer of 1966.<sup>287</sup>

The growing distance between Johnson and King arose from both strategic and political differences that increasingly came to the fore by the middle of the decade. King had supported the upstart Mississippi Freedom Democratic Party (“MFDP”) at the 1964 Democratic National Convention. The racially integrated MFDP objected to the all-white delegation and threatened to protest if they were not allowed to be seated at the Convention.<sup>288</sup> President Johnson viewed the MFDP as disruptive and counter-productive, and he denied King’s request for

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rights. *Id.*

280. WOODS, *supra* note 256, at 575; see KOTZ, *supra* note 87, at 179, 270.

281. BESCHLOSS, *supra* note 260, at 420.

282. KOTZ, *supra* note 87, at 270.

283. WOODS, *supra* note 256, at 575.

284. KOTZ, *supra* note 87, at 66, 195.

285. *Id.* at 278. However, Johnson was not completely consistent in his discomfort with protests. During the civil rights protests in Selma, Johnson explicitly encouraged King to keep the pressure on Congress, which quite likely meant continuing the demonstrations. *Id.* at 253.

286. ANDERSON & PICKERING, *supra* note 2, at 180; RALPH, *supra* note 2, at 181.

287. See *supra* text accompanying notes 260-69.

288. GARROW, BEARING THE CROSS, *supra* note 2, at 341-43; KOTZ, *supra* note 87, at 250. The Mississippi Freedom Democratic Party (“MFDP”) threatened to protest at the convention if their demands were not met. Johnson had requested a moratorium on all marches, protests, and other potentially disruptive activities until after election day because he feared such events would improve Republican Barry Goldwater’s chances in the presidential election. GARROW, BEARING THE CROSS, *supra* note 2, at 343. Johnson expected King and other civil rights leaders to back him up. *Id.* Though the National Association for the Advancement of Colored People (“NAACP”) supported the call for a moratorium, King continued to speak out on behalf of the MFDP. *Id.* at 341-43, 346, 348.

them to be represented at the Convention.<sup>289</sup>

Most importantly, Dr. King had begun to speak out publicly against the Vietnam War in August 1965, less than a week after the President signed the Voting Rights Act.<sup>290</sup> King's opposition to the war grew to the point that he could no longer remain silent. At the annual convention of SCLC, King told a crowd of 3500 people that "the true enemy is war itself."<sup>291</sup> He began to call on those in power to stop the war.<sup>292</sup> He called on the President to state clearly that the administration would be willing to negotiate with the Viet Cong.<sup>293</sup>

The heart of the issue was a moral question for King. Peace was a moral imperative.<sup>294</sup> He also viewed the Vietnam War as closely connected with the issues of civil rights and poverty, about which he cared so deeply.<sup>295</sup> Funding the war drained resources from those desperately needed for civil rights and Johnson's "Great Society" programs.<sup>296</sup> Additionally, Black draftees disproportionately waged the war and suffered the sacrifices of Vietnam, still another form of exploitation and oppression the system imposed on Blacks.<sup>297</sup>

For President Johnson, King's public opposition to the war constituted a betrayal that ruptured an already tenuous and tense relationship.<sup>298</sup> The President was outraged by King's outspoken opposition to the war, especially because Johnson had worked so hard to get landmark civil rights legislation through Congress.<sup>299</sup>

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289. GARROW, BEARING THE CROSS, *supra* note 2, at 346-48.

290. *Id.* at 438.

291. BRANCH, *supra* note 2, at 287.

292. GARROW, BEARING THE CROSS, *supra* note 2, at 438.

293. *Id.*

294. RALPH, *supra* note 2, at 181; *see* GARROW, BEARING THE CROSS, *supra* note 2, at 443, 453.

295. *See* GARROW, BEARING THE CROSS, *supra* note 2, at 438; KOTZ, *supra* note 87, at 346.

296. WOODS, *supra* note 256, at 786. Johnson introduced his Great Society initiative in May 1964, as a plan to develop a series of working groups tasked to tackle specific problem areas in an effort to create a great society. GRAHAM, *supra* note 114, at 153. Johnson's plan to "provide material benefits to the needy but also improve the quality of life for everyone" included, among other programs, education assistance, health programs, immigration reforms, and antipoverty measures. KOTZ, *supra* note 87, at 259. Johnson was able to push a number of these reform bills through Congress before the lack of progress in Vietnam took its toll on his political capital. *Id.* at 368-69.

297. WOODS, *supra* note 256, at 786.

298. *See* DALLEK, *supra* note 249, at 467.

299. *Id.* In a telephone conversation on August 20, 1965, Johnson told King "that members of Congress had 'the impression that you are against me on Vietnam.'" KOTZ, *supra* note 87, at 345. Johnson also said, "You better not leave that impression . . . I want peace as much as you do . . . Let's not let this country get divided." *Id.* at 345-46.

The White House Conference on Civil Rights planned for the spring of 1966 also illustrated the growing rift between Johnson and King. The conference, initially supported by all of the major

As criticism of the war mounted, Johnson became even more sensitive to his critics.<sup>300</sup> In November 1965, the President called King, and they discussed Vietnam.<sup>301</sup> Johnson laid out his reasoning and his “middle [of the] road” strategy for the war.<sup>302</sup> King listened, but the conversation did nothing to change his views.<sup>303</sup> Johnson and King never spoke privately again.<sup>304</sup>

Johnson also had serious concerns about King’s relationship with the Communist Party. FBI head J. Edgar Hoover repeatedly sent the President reports detailing the Communist influence on King and his movement.<sup>305</sup> The FBI emphasized the Communist connections of two of King’s closest advisors.<sup>306</sup>

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civil rights groups, was supposed to launch a new dialogue about the status of civil rights in the United States. ANDERSON & PICKERING, *supra* note 2, at 171, 195; KOTZ, *supra* note 87, at 359. However, Johnson’s seeming embrace of the controversial Moynihan report was the beginning of a significant split between civil rights leaders and the President, and ensured that the conference would be disastrous. ANDERSON & PICKERING, *supra* note 2, at 171, 195; KOTZ, *supra* note 87, at 359; RAINWATER & YANCEY, *supra* note 21, at 5, 6, 16, 275. The Moynihan report, which attributed the condition of Blacks in the United States to the breakdown of the Black family, and the White House’s response, enraged civil rights leaders. ANDERSON & PICKERING, *supra* note 2, at 171, 195; KOTZ, *supra* note 87, at 359; RAINWATER & YANCEY, *supra* note 21, at 5, 6, 16, 275. Though the civil rights conference did ultimately take place, Johnson did not personally invite King, as he might have previously. ANDERSON & PICKERING, *supra* note 2, at 171, 195; KOTZ, *supra* note 87, at 359. The conference itself provided little room for new dialogue, instead expecting attendees to respond to the White House’s proposed policies. See ANDERSON & PICKERING, *supra* note 2, at 171, 195; KOTZ, *supra* note 87, at 359; RAINWATER & YANCEY, *supra* note 21, at 5, 6, 16, 275.

300. KOTZ, *supra* note 87, at 346.

301. *Id.* at 371.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 195-96. Hoover’s reports consisted of secondhand information, most of which was uncorroborated. WOODS, *supra* note 256, at 577. The reports emphasized that King was being used by communists for their political advantage, and they concluded by summarizing the “communist credentials” of King’s advisors. *Id.* Hoover’s accusations had led Attorney General Robert Kennedy to authorize wire taps of King’s house and his Atlanta and New York offices in 1963. *Id.* at 576.

306. King first worked with Bayard Rustin, a longtime advocate of nonviolent protest, on the Montgomery bus boycott, and Rustin soon became one of King’s closest advisors. GARROW, BEARING THE CROSS, *supra* note 2, at 93. Rustin also was rumored to have communist sympathies, so the FBI kept him under close watch which included wiretapping Rustin’s phone. KOTZ, *supra* note 87, at 351. Another of King’s close advisors, Stanley Levinson, was also kept under tight surveillance due to his ties to the Community party, including FBI allegations that Levinson was a Communist agent. GARROW, BEARING THE CROSS, *supra* note 2, at 116-17, 195. By the time he became close to King, Levinson had severed all direct ties, but he did continue to offer some financial assistance to the party. *Id.* at 195. After King violated a direct request from Robert

King's public opposition to the Vietnam War only increased Johnson's concerns about the civil rights leader's possible communist connections.<sup>307</sup>

Moreover, by 1966, Johnson had become convinced that civil rights demonstrations had outlived their usefulness, as evidenced by the disruption they caused in Chicago.<sup>308</sup> By the time Congress was considering the fair housing bill that year, Johnson and King were largely estranged.<sup>309</sup> So while Johnson and Daley had frequent conversations about the CFM in the summer of 1966, Johnson and King had none.<sup>310</sup>

2. *Public Reaction to the CFM.*—As in the South, the Chicago Movement's leadership wanted to take dramatic action that would provoke resistance and elicit both local and national public support for their cause. To a large extent, however, that strategy backfired in Chicago. The CFM's activities alienated many of those who had previously supported the Southern civil rights movement politically and even financially.<sup>311</sup> For many whites in the North, racial discrimination was a Southern phenomenon, epitomized by Jim Crow laws and customs, barriers to political participation, and violence by white supremacist organizations. These whites thought that Southern civil rights activists had no reason to come North and were not welcome there.<sup>312</sup>

Moreover, Chicago was a great American city and a destination for two great 20th century migrations of Southern Blacks. It was a land of opportunity, where Blacks participated actively in the political process as well as the labor market. Consequently, many whites thought that it was particularly offensive for "outside agitators" to target Chicago. Much of Chicago's Black community shared the view that Southern civil rights activists should have continued their work in the South rather than disrupting the racial accommodation that they had reached in Chicago.<sup>313</sup>

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Kennedy to end all contact with Levinson, Kennedy approved FBI wiretaps on both King's home and his Atlanta office. *Id.* at 195, 304.

307. KOTZ, *supra* note 87, at 351.

308. President Johnson felt that the media coverage of the violence that greeted the open housing marches reflected badly on his leadership. See RALPH, *supra* note 2, at 183. The negative press was particularly problematic because Johnson felt that he had done so much to help the cause of civil rights. KOTZ, *supra* note 87, at 195.

309. See KOTZ, *supra* note 87, at 371.

310. RALPH, *supra* note 2, at 181.

311. *Id.* at 184, 186.

312. See CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 210-11 (1977).

313. RALPH, *supra* note 2, at 189; see BRANCH, *supra* note 2, at 441; FAIRCLOUGH, *supra* note 16, at 304. Unlike some earlier movements, such as the Montgomery bus protest, Chicago's large and economically diverse Black population was not united in the effort to achieve fair housing. RALPH, *supra* note 2, at 177-78, 185. There was a good deal of internal debate about goals and objectives, as well as strategy and tactics. *Id.* at 177-89. More importantly, many Black clergy, politicians, and residents objected to the Movement, including the presence of outsiders who were

The vast majority of whites living in Gage Park, Marquette Park, and the other neighborhoods in which marches took place strongly objected to these intrusions into their communities.<sup>314</sup> Private property rights were at stake, unlike the public discrimination that activists and legislators were appropriately challenging in the South.<sup>315</sup> When Jesse Jackson announced a plan to march into the racially exclusionary suburb of Cicero, whites in and outside of Cicero criticized the activists for their provocative plans rather than the Cicero residents for their racist attitudes and actions.<sup>316</sup>

3. *Congress.*—While the House of Representatives passed a very limited fair housing bill in 1966, Senate opponents filibustered the bill to death.<sup>317</sup> The events in Chicago seem to have contributed to the opposition among legislators. According to Justice Department official Roger Wilkins, “The most significant and best publicized opposition to the [fair housing bill] was . . . based on the opposition to ‘conduct,’ i.e., the marches of the Chicago Freedom Movement through white neighborhoods in Chicago.”<sup>318</sup>

a. *The Senate: Senator Everett Dirksen’s role.*—While much of the civil rights legislation of the 1960s had the support of the majority of the Senate, there was a coalition of segregationist Southern Democrats and conservative Republicans that repeatedly used the filibuster device in an attempt to block a full Senate vote.<sup>319</sup> Since cloture required a two-thirds vote, the filibuster was a potent weapon and a major obstacle to enacting civil rights legislation.<sup>320</sup> Thus, the largest hurdle in Congress was usually the threat or reality of a filibuster in the Senate.<sup>321</sup> The two-thirds vote required for cloture could be achieved only if Republicans joined with non-Southern Democrats in sufficient numbers to invoke cloture and pave the way for the majority of the senators in favor of civil rights

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spearheading much of the activity. *Id.*

314. RALPH, *supra* note 2, at 126-27.

315. Whites resisting Black entry into their neighborhoods and communities used a number of rationales to justify their violent resistance to the entrance of Blacks. These rationales included defining Blacks as invaders and then invoking a skewed interpretation of traditional justification defenses, such as self-defense, defense of others, defense of property, and even defense of country. Rubinowitz & Perry, *supra* note 100, at 367-77. Additionally, whites rationalized their resistance as acts of “norm enforcement,” punishing Blacks for violating society’s social norms, which included the residential separation of the races. *Id.* at 375-76.

316. See BRANCH, *supra* note 2, at 515. At a mass meeting, before Movement leaders had decided on any further plans, the young Reverend Jesse Jackson announced, “I’m going to Cicero!” *Id.* Cicero had an extensive history of racial violence. *Id.*; see also MEYER, *supra* note 100, at 118-19.

317. See *supra* note 192 and accompanying text.

318. RALPH, *supra* note 2, at 193-94.

319. See GRAHAM, *supra* note 114, at 203.

320. STANDING RULES OF THE SENATE XXII (2).

321. See GRAHAM, *supra* note 114, at 142, 151-52, 171.

legislation to vote for it.<sup>322</sup>

As a result, Senate Minority Leader Everett Dirksen, a Republican from Illinois, played a critical role in all of the civil rights legislation of the 1960s.<sup>323</sup> Senator Dirksen held the key to securing the Republican votes needed for cloture.<sup>324</sup> He was a powerful minority leader who had great influence with Senate Republicans and was the only person potentially capable of securing enough Republican votes for cloture to avoid a legislation-killing filibuster.<sup>325</sup> Dirksen had established a pattern of withholding his support until late in the process, negotiating changes in the bills that were favorable to his interests—especially mitigating their impact on the North—and then securing the needed Republican votes for cloture.<sup>326</sup> He also had a close political and personal relationship with President Johnson, which made his role in civil rights legislation even more crucial.<sup>327</sup> So the Johnson Administration turned to Dirksen for his support in 1966, just as it had in previous years.<sup>328</sup>

Early on, Senator Dirksen made clear his strong opposition to the fair

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322. *See id.* at 150-52, 171. Votes for cloture were necessary in both 1964 and 1965 to end filibusters holding up major civil rights legislation. *Id.* at 151-52, 171.

323. *1966 Legislative Chronology*, *supra* note 189, at 372; RALPH, *supra* note 2, at 192; EDWARD L. SCHAPSMEIER & FREDERICK H. SCHAPSMEIER, *DIRKSEN OF ILLINOIS: SENATORIAL STATESMAN* 155-56 (1985). President Johnson recognized that Dirksen's support and his active efforts to gain Republican votes were essential to the passage of any civil rights legislation. SCHAPSMEIER & SCHAPSMEIER, *supra*, at 155.

324. *See 1966 Legislative Chronology*, *supra* note 189, at 372; RALPH, *supra* note 2, at 192; SCHAPSMEIER & SCHAPSMEIER, *supra* note 323, at 155. In 1964 and 1965, Dirksen's leadership had proven crucial to overcoming the Southern Democratic filibuster and passing the Civil Rights Act and the Voting Rights Act, respectively. BYRON C. HULSEY, *EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS* 224 (2000); *see also* ROGER BILES, *CRUSADING LIBERAL: PAUL H. DOUGLAS OF ILLINOIS* 189 (2002) [hereinafter BILES, *CRUSADING LIBERAL*].

325. SCHAPSMEIER & SCHAPSMEIER, *supra* note 323, at 155-56.

326. "Dirksen learned early in his career that by holding out on compromise at first, he could better position himself further down the line—especially with regard to civil rights legislation." Sean Morales-Doyle, *Unexpected Delay: A Legislative History of the Fair Housing Act of 1968* (May 9, 2007) (unpublished student paper, Northwestern University School of Law) (on file with Author) (citing HULSEY, *supra* note 324, at 102-03).

327. Letter from Lyndon B. Johnson, U.S. Senator, to Everett M. Dirksen, U.S. Senator (Apr. 27, 1959) (copy on file with the Indiana Law Review) (thanking Dirksen for the "quality of [his] friendship, the depth of [his] understanding and the extent of [his] cooperation"); *see* HULSEY, *supra* note 324, at 248-53 (detailing Dirksen's friendship with Johnson and his habit of supporting Johnson on issues such as the Vietnam War even as he criticized them and despite the fact that it earned him a reputation as a "double agent" in some circles); SCHAPSMEIER & SCHAPSMEIER, *supra* note 323, at 150-51.

328. Memorandum from Nicholas deB. Katzenbach, U.S. Attorney Gen., to Lyndon B. Johnson, U.S. President (Sept. 9, 1966) (copy on file with the Indiana Law Review).

housing bill.<sup>329</sup> He argued that it was an unconstitutional intrusion on property rights and beyond the power of Congress under the Fourteenth Amendment and the Commerce Clause.<sup>330</sup>

The CFM's marches into white neighborhoods seemed to harden Dirksen's opposition to fair housing legislation. He expressed his opposition to the Movement publicly, labeling it as "calculated harassment" and "a species of intimidation."<sup>331</sup> He said, "It's like saying they're gonna do this or else."<sup>332</sup> He viewed the marches as designed to pressure Congress to enact what he considered to be bad legislation.<sup>333</sup>

In his objections to CFM marches, Dirksen seemed to conflate violence by whites against Black civil rights marchers with Blacks carrying out violence in their own communities in the form of riots or urban rebellions. He considered these very different forms of violence as equally "caused" by Blacks.<sup>334</sup> He thought that Blacks were culpable in the civil rights violence because they had the unseemly goal of interfering with white people's property rights and their well-founded belief that their home was their "castle."<sup>335</sup> To Dirksen, not only was the goal of the Chicago Movement illegitimate, but its means were reprehensible.<sup>336</sup> He saw civil rights activists as exacerbating the situation by generating confrontations with their marches into white neighborhoods.<sup>337</sup> In his view, the marchers were responsible for the violence they provoked from white resisters.<sup>338</sup>

*b. The House of Representatives.*—While the House did pass a fair housing bill in 1966, it had become watered down as it worked its way through the legislative process.<sup>339</sup> In August, the House exempted real estate brokers who sold single-family homes.<sup>340</sup> It also excluded from coverage privately owned

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329. KOTZ, *supra* note 87, at 116. Dirksen was deeply committed to protecting property rights and expected private property to remain exempt from public regulation. *See id.*; HULSEY, *supra* note 324, at 188, 224-25.

330. 1966 *Senate Hearings*, *supra* note 246, at 1160-65 (statement of Nicholas deB. Katzenbach, U.S. Att'y Gen.) (displaying argument between Dirksen and Katzenbach about the constitutionality of the proposed legislation under the Fourteenth Amendment and the Commerce Clause); BILES, CRUSADING LIBERAL, *supra* note 324, at 189; HULSEY, *supra* note 324, at 224.

331. RALPH, *supra* note 2, at 192.

332. *Id.*

333. *Id.*

334. *See id.*

335. *See id.*

336. *Id.*

337. *Id.*

338. *See id.*

339. GRAHAM, *supra* note 114, at 261. Graham indicates that the House Republicans had little power in 1966 because of the "Goldwater debacle," implying that the bill passed the House because of the sheer numbers of Democrats. *Id.*

340. *See HARVEY, supra* note 190, at 38.

homes with less than five residential units.<sup>341</sup> The amended bill covered only large apartment buildings and developments—about forty percent of the nation’s housing.<sup>342</sup>

Some members of Congress conflated the CFM—and the violence by whites—with the violence in the urban rebellions in Chicago and elsewhere.<sup>343</sup> The bill’s supporters tried to draw a clear distinction between the Blacks who were rioting and those who were engaged in lawful protest.<sup>344</sup> However, many of the opponents used the word “rioters” to refer to all Blacks, regardless of whether they were peacefully protesting or engaged in violence.<sup>345</sup>

The resulting confusion undermined support for any civil rights legislation. In early August 1966, Illinois Congressman Dan Rostenkowski, a staunch Daley ally, stated that “his mail has been extremely heavy in opposition to the Civil Rights Bill.”<sup>346</sup> He referred to the “touchiness” of the “race problems” in Chicago “and how the white citizens and the police are becoming very aggravated.”<sup>347</sup>

When the 1966 civil rights bill died in September, Martin Luther King expressed the depth of his disappointment and his concern about the consequences.<sup>348</sup> He lamented that “[t]he executioners of the 1966 civil rights bill have given valuable assistance to those forces in the Negro communities who counsel violence. Although I will continue to preach with all my might the moral rightness of nonviolence, my words are now bound to fall on more deaf ears.”<sup>349</sup>

### III. 1968: PASSING THE FAIR HOUSING ACT

It is certainly possible that with the passage of time and the presence of intervening forces pressing for fair housing legislation, the CFM made little or no contribution to the passage of the Fair Housing Act in 1968. Factors that have been credited with contributing to its passage include: the election of several moderate Republicans to the Senate in 1966, President Johnson’s increased efforts to push the legislation through, Senator Dirksen’s last minute switch to support cloture, and Martin Luther King’s assassination.<sup>350</sup> It is also possible that

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341. RALPH, *supra* note 2, at 174-75.

342. *Id.*; HARVEY, *supra* note 190, at 38.

343. BONASTIA, *supra* note 22, at 83; RALPH, *supra* note 2, at 191.

344. BONASTIA, *supra* note 22, at 83.

345. *Id.*

346. Memorandum from Jake Jacobsen, Legislative Counsel, to Lyndon B. Johnson, U.S. President (Aug. 10, 1966) (copy on file with the Indiana Law Review).

347. *Id.*

348. When the House-passed bill was sent to the Senate, King changed his position and expressed his support for the proposed fair housing legislation. BONASTIA, *supra* note 22, at 80.

349. BERNSTEIN, *supra* note 214, at 392.

350. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149, 158, 160 (1969); see GRAHAM, *supra* note 114, at 270-72. CFM contributed inadvertently to the election of Charles Percy—one of the moderate Republicans who

the bill was passed *in spite* of the impact of the CFM, given the arguably negative impact on the legislative process in 1966.<sup>351</sup>

However, the evidence suggests that the CFM probably constituted one of the “constellation of forces” that contributed to the surprise enactment of the Fair Housing Act in April of 1968.<sup>352</sup> In spite of its negative short-term effects on the efforts to pass fair housing legislation, the CFM’s lingering positive impact came to the fore in support of its final passage.

#### *A. President Johnson’s Role*

By 1968, the implications of the CFM for President Johnson had changed. The Movement itself had long since ended, and the key players had left Chicago. Johnson could pursue fair housing legislation without the risk of embarrassing and alienating Mayor Daley.<sup>353</sup> Finally, Dr. King’s assassination provided an opportunity for President Johnson to press for prompt passage of the Fair Housing Act as a step towards fulfilling King’s dream of racial equality.

While President Johnson could not use the violent reaction to Chicago’s 1966 open housing marches as a basis for pressing for Congressional legislation, his knowledge of the events on the ground there certainly deepened his understanding of the problem of housing discrimination and the need for federal legislation. From the outset, he had defined the problem of housing discrimination as national in scope—rather than as solely regional. In his first State of the Union Message, on January 8, 1964, Johnson said, “Let me make one principle of this administration abundantly clear: All of these increased opportunities—in employment, in education, in housing, and in every field, must be open to Americans of every color.”<sup>354</sup> As a Southerner, he had no incentive to think of this form of racial discrimination as confined to the South. Unlike many Northern politicians, Johnson had nothing invested in the false belief that racial discrimination was exclusively a Southern problem.<sup>355</sup>

Ironically, the telephone conversations with Mayor Daley in the summer of 1966 helped inform President Johnson of the vehemence of whites’ resistance to Black families’ entry into all-white neighborhoods.<sup>356</sup> While Mayor Daley was conveying a message of disruption and disorder, with which the President could

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defeated incumbent Paul Douglas. *See infra* notes 368-69 and accompanying text.

351. *See infra* notes 382-83 and accompanying text.

352. *Assessing the Chicago Freedom Movement*, *supra* note 9. Bill Moyer, a CFM participant, suggests that “[t]he Chicago Open Housing Movement also made a critical contribution to the passage of the 1968 Civil Rights Act, which outlawed racial discrimination in housing.” BILL MOYER ET AL., *DOING DEMOCRACY: THE MAP MODEL FOR ORGANIZING SOCIAL MOVEMENTS* 133 (2001).

353. *See infra* notes 362-64 and accompanying text.

354. Lyndon B. Johnson, U.S. President, State of the Union (Jan. 8, 1964), *available at* <http://www.americanrhetoric.com/speeches/16j1964stateoftheunion.htm>.

355. *See BRAUER*, *supra* note 312, at 210-11.

356. *See supra* notes 257-77 and accompanying text.

empathize, the Mayor was also painting a picture of a city that was extremely hostile to Blacks' moving freely into traditionally white neighborhoods.<sup>357</sup>

Moreover, President Johnson received reports from his staff about events on the ground in Chicago that summer. At one point, he sent high-level administration officials to Chicago to observe what was happening and report back to him.<sup>358</sup> This provided additional information about the nature and extent of white resistance to Blacks moving into "their" white neighborhoods. He also received reports from his staff in Washington who were keeping tabs on the situation in Chicago.<sup>359</sup>

After the Summit Agreement was signed in August 1966, King left Chicago.<sup>360</sup> While he talked of monitoring compliance and renewing activities in the city if the parties did not meet their commitments, there was little substance to those threats.<sup>361</sup> As a practical matter, the Movement had ended with the signing of the Summit Agreement.<sup>362</sup> In February 1967, President Johnson's staff reported to him that Martin Luther King had left Chicago and the Movement there had ended.<sup>363</sup> The disruption in the streets that had so angered

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357. See *supra* notes 257-77 and accompanying text.

358. Johnson sent both Assistant Attorney General John Doar and Community Relations Service Director Roger Wilkins to Chicago. KOTZ, *supra* note 87, at 365. They came away very impressed with King's work in the city. *Id.* at 365-66.

359. Joseph Califano, Special Assistant for Domestic Affairs, reported to the President that the situation in Chicago was deteriorating. Memorandum from Joseph Califano, Special Assistant for Domestic Affairs, to Lyndon B. Johnson, U.S. President (July 15, 1966) (copy on file with the Indiana Law Review).

360. COHEN & TAYLOR, *supra* note 24, at 423.

361. Upon returning to Atlanta, King told his congregation that the negotiations were "a first step in a thousand mile journey." GARROW, BEARING THE CROSS, *supra* note 2, at 524. However, most evidence indicates that very little actually happened after the Summit. The CFM petered out over the course of the next few months. RALPH, *supra* note 2, at 195. The main follow-up was the creation of an organization to pursue fair housing activities on a metropolitan-wide basis—the Leadership Council for Metropolitan Open Communities—but little else happened. *Id.* at 207-08. Most of Chicago's white voters were pleased that very little civil rights progress resulted from the Summit Agreement. BILES, RICHARD J. DALEY, *supra* note 55, at 136-37. Whites and Blacks alike gave Daley a resounding fourth-term re-election victory in 1967. *Id.* He garnered seventy-three percent of the votes—including four-fifths of the Black vote—and won all fifty wards. *Id.*; FAIRCLOUGH, *supra* note 16, at 305. As a result of CFM, Daley's "opposition to civil rights groups hardened, and he became known as one of the greatest northern opponents of the civil rights movement." BILES, RICHARD J. DALEY, *supra* note 55, at 136-37.

362. RALPH, *supra* note 2, at 195. King returned to Chicago briefly in October of 1966 and was disturbed by the failure to implement the agreement. GARROW, BEARING THE CROSS, *supra* note 2, at 535. He even threatened to resume demonstrations, but nothing came of it. *Id.* at 535-36.

363. Memorandum from Nicholas deB. Katzenbach, U.S. Attorney Gen., to Lyndon B. Johnson, U.S. President (Feb. 27, 1967) (copy on file with the Indiana Law Review).

Attorney General Katzenbach informed the President in late February, 1967, that

and frustrated Mayor Daley had long since passed. So the President's active efforts on behalf of fair housing legislation would no longer risk undermining his relationship with Chicago's mayor. Early in 1967, Johnson had asked for and received assurances from his staff concerning "the plans of civil rights organizations in Chicago."<sup>364</sup> With King and the Movement gone from Chicago, Johnson's support for fair housing legislation could not readily be associated with earlier events in Chicago.<sup>365</sup>

Ironically, President Johnson's call for Congress to enact the fair housing bill in the wake of King's 1968 assassination—something he had been pushing all along—may have been rooted implicitly in the CFM. The best evidence that enactment of that bill would serve as a step toward fulfilling King's dream was the campaign Dr. King waged against housing discrimination and segregation in Chicago during the summer of 1966.<sup>366</sup>

While King's involvement in housing desegregation served as a rhetorical basis for the President and Congress to move forward on fair housing legislation in the aftermath of Dr. King's death, still another irony remained. It is highly unlikely that King would have sought that particular legislation as the way of continuing his work. Instead, he had shifted his energy during the last part of his life to more fundamental problems of poverty and economic inequality.<sup>367</sup> In his testimony before the President's Advisory Commission on Civil Disorders only a few months before his death, King emphasized these concerns in both his own statement and response to commissioners' questions.<sup>368</sup> While he mentioned the need for strong fair housing legislation,<sup>369</sup> King devoted most of his attention to the need for a massive federal spending program to provide jobs and income for

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[a]t this point there is nothing planned in the way of demonstrations for the immediate future, and, insofar as I can see, for any time. Dr. King is not in Chicago, and his principal lieutenants, Jim Bevel and Hosea Williams, have also withdrawn from the scene. I don't think there is any intention of returning.

*Id.*

364. *Id.* Johnson also asked about the status of Daley's re-election campaign, presumably in order to be sure that everything was on track for Daley to continue in office. *See id.*

365. In fact, Daley had pushed through a fair housing ordinance in Chicago in 1963. RALPH, *supra* note 2, at 115 n.68 (citing an interview with James Murray in which Murray recalled that "Mayor Daley called me in and said that the city needed a fair-housing ordinance and would I draft it . . . . My own feeling is that he did it for the good of the city.").

366. *See supra* Part II.

367. KOTZ, *supra* note 87, at 380-81. In still another ironic twist, the Johnson White House had been strategizing before King's death about how to pre-empt King's proposed "Poor People's Campaign's" giant march in Washington slated for April 1968, where the nation's poor would stay until America responds. *See* DALLEK, *supra* note 249, at 533.

368. *See* Dr. Martin Luther King, Jr., Remarks at a Meeting of the National Advisory Commission on Civil Disorders 2773-2825 (Oct. 23, 1967) (transcript available from the Indiana Law Review).

369. *Id.* at 2791-92.

low-income Americans.<sup>370</sup>

### *B. The Senate: Ending the Filibuster*

As with other 1960s civil rights legislation, opponents in the Senate used the filibuster to try to prevent a full Senate vote on what became the 1968 Civil Rights Act.<sup>371</sup> As discussed earlier, fair housing opponents had engineered a successful filibuster in 1966, even using the CFM as fodder for their opposition.<sup>372</sup>

Virtually all observers expected the same result in the Senate in 1968.<sup>373</sup> Since the summer of the CFM, fair housing had developed into a politically charged issue at the national level.<sup>374</sup> Additionally, some Northern members of Congress had been frightened by the violent white response to the Chicago demonstrations and were hesitant to take any action that might provoke similar violence in their districts.<sup>375</sup> The civil rights movement was also suffering from declining support in the wake of white backlash to civil rights progress and the fear of the growing Black Power movement.<sup>376</sup>

Early in 1968, Senate Minority Leader Everett Dirksen of Illinois seemed to remain unalterably opposed to federal fair housing legislation.<sup>377</sup> His continued opposition would probably have doomed the bill, because Dirksen's support was required to bring along enough moderate Republicans to reach the two-thirds votes needed for cloture.<sup>378</sup>

While Senator Dirksen strongly objected to the CFM's strategies and tactics, he, like President Johnson, learned more about the depth of housing discrimination from CFM. Moreover, to the extent that Dirksen viewed all violence as equally problematic, his desire to stem the tide of urban violence may have come in response to the events of the CFM as well as several "long, hot summers" in Chicago and many other cities.<sup>379</sup> The Fair Housing Act could be a vehicle for reducing the level of urban violence—a critical task for Congress

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370. *Id.* at 2776-77, 2810-25.

371. GRAHAM, *supra* note 114, at 150-52, 171.

372. *See supra* Part II.

373. KOTZ, *supra* note 87, at 389; Dubofsky, *supra* note 350, at 149. Unlike in 1966, NAREB did little lobbying before the Senate vote. BONASTIA, *supra* note 22, at 87. Apparently, the organization was taken by surprise by the broad support this time around. *Id.*

374. KOTZ, *supra* note 87, at 389.

375. *Id.* at 389-90.

376. *See id.*

377. *See supra* note 330 and accompanying text.

378. Johnson depended on Dirksen to gather votes among the Senate Republicans, primarily by agreeing to amendments, often weakening ones, in exchange for votes. 1966 *Legislative Chronology*, *supra* note 189, at 370; GRAHAM, *supra* note 114, at 141-42; *see* SCHAPSMEIER & SCHAPSMEIER, *supra* note 323, at 150-51.

379. GRAHAM, *supra* note 114, at 273; *see also* BONASTIA, *supra* note 22, at 86.

to undertake.<sup>380</sup>

In announcing his changed position on cloture, Senator Dirksen also spoke of his concern that Black Vietnam veterans could face discrimination in housing upon their return.<sup>381</sup> The CFM could only have made him more aware of that possibility, which he wished to prevent through federal legislation.

The results of the election for the other Illinois Senate seat in November 1966 may also provide a connection between the CFM and Senator Dirksen's changed position on fair housing legislation. In that election, incumbent Democrat Paul Douglas lost his seat to Republican Charles Percy.<sup>382</sup> Part of the reason for the Republican victory was a negative reaction among white voters to the marches of the CFM.<sup>383</sup> Nevertheless, Dirksen may have interpreted the election of Percy as an indication of Republican strength in Illinois. Dirksen would be running for re-election in 1968, and the Percy victory in 1966 may have given him reassurance that his support of fair housing legislation would not endanger his victory in November.

### *C. The House of Representatives: Honoring Dr. King's Memory?*

When Martin Luther King was assassinated on April 4, 1968, the fair housing bill had already passed in the Senate and had been debated in the House.<sup>384</sup> It was passed by the House six days later and signed into law by

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380. The President's Advisory Commission on Civil Disorders (the "Kerner Commission," after Governor Otto Kerner of Illinois, the chair of the commission) was released shortly before the successful cloture vote in the Senate. BONASTIA, *supra* note 22, at 86. The Commission recommended that Congress enact comprehensive fair housing legislation. KERNER REPORT, *supra* note 196. It is uncertain what effect, if any, the report had on ending the Senate filibuster. It is also uncertain what effect, if any, the CFM had on the Commission's report and recommendation. Governor Kerner was certainly aware of the resistance to racial integration in Chicago, a view reflected in the Commission's report. In fact, Kerner had prepared the Illinois National Guard in anticipation of an announced CFM march into Cicero, a notoriously racially exclusionary suburb bordering Chicago. RALPH, *supra* note 2, at 111, 166; *Recordings Prove Charge, Says Daley; Guard Patrols Streets*, CHI. TRIB., July 16, 1966, at 1.

381. Mathias & Morris, *supra* note 190, at 25; Morales-Doyle, *supra* note 326, at 47 (citing Mathias & Morris, *supra* note 190, at 25).

382. BILES, CRUSADING LIBERAL, *supra* note 324, at 197-98.

383. *Id.*; SCHAPSMEIER & SCHAPSMEIER, *supra* note 323, at 186. Biles describes fair housing as the "most volatile" issue on the table during the 1966 race between Douglas and Percy. BILES, CRUSADING LIBERAL, *supra* note 324, at 194. He points out that Douglas not only lost some of Chicago's white homeowners who were upset by the marches because of his racial liberalism, but he also lost the votes of some of those who supported the CFM because he had not provided enough support to the Movement. *Id.* Douglas complained of Percy's forces, saying, "They are trying to get the young Negroes to oppose me on the ground that I haven't done enough, and to get the Whites to oppose me on the ground that I had done too much." *Id.* at 194.

384. At the beginning of April, it looked like that bill might die in committee. BONASTIA, *supra* note 22, at 87.

President Johnson on April 11.<sup>385</sup>

The assassination of Martin Luther King demanded prompt action by the federal government for both symbolic and practical reasons.<sup>386</sup> The nation was in mourning and in flames, and congressional action represented a way to make a unifying statement about the collective loss the country had suffered.<sup>387</sup> At the same time, Black communities in a number of cities, including the nation's capital, erupted in violence in the aftermath of the assassination.<sup>388</sup> Some members of Congress believed that a legislative response would help to address the frustrations triggering the violence and restore calm and order in those communities.<sup>389</sup>

Supporters of the fair housing bill successfully used the tragedy to press the House for its passage.<sup>390</sup> Some suggest that President Johnson and the House of Representatives focused on open housing legislation as a memorial to Dr. King because of the commitment King had shown to this issue through the CFM.<sup>391</sup> It was the Chicago Movement that first associated King with the issue of housing discrimination and the goal of federal fair housing legislation. So there was a logic, or at least a political rationale, for using the passage of the Fair Housing Act as a way of memorializing him.

The day after the assassination, President Johnson urged prompt passage of

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385. Graham, *supra* note 114, at 271-72; *see* Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. § 3601-3619 (2000)). It passed in spite of the fact that the Republicans gained forty-seven seats in the House in the 1966 elections, which moved the body in a more conservative direction. Sidney, *supra* note 195, at 190.

386. President Johnson met with a group of civil rights leaders the next day, including Clarence Mitchell and Roy Wilkins of the NAACP, Whitney Young of the Urban League, and Walter Fauntroy of the SCLC. JOHNSON, THE VANTAGE POINT *supra* note 214, at 175. According to Johnson, those in attendance wanted to push forward with something "positive to carry the people" in the wake of the tragedy. *Id.* at 176.

387. The country was in a state of disarray bordering on chaos. One historian described "a national mood of remorse that even the massive urban rioting that followed could not erase." GRAHAM, *supra* note 114, at 272.

388. BRANCH, *supra* note 2, at 767.

389. *See* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 362-63 (2007).

390. One historian has suggested that "[t]he passage of the 1968 act came almost as a surprise, and many viewed it as more a commemoration of King in the wake of his assassination than a response to a national call for reform." RALPH, *supra* note 2, at 234.

391. In July 2006, participants in the CFM held a national conference called CFM 40, commemorating the 40th anniversary of the Movement. One commentator at the conference suggested that President Johnson and Congress focused on fair housing legislation as an appropriate tribute for King after the assassination because of the interest in the issue that King articulated in Chicago in 1966. Aldon Morris, Professor, Nw. Univ., Remarks at the CFM 40 (July 24, 2006). While King had turned his attention to the problem of poverty and economic inequality after he left Chicago, he continued to indicate support for federal fair housing legislation. *Id.*

the Civil Rights Act of 1968, including the fair housing provisions.<sup>392</sup> He suggested that this would be a way of continuing King's work.<sup>393</sup> The fair housing bill provided an opportunity for the Congress to act quickly on a measure that could be linked directly to King's agenda. Both in the CFM and in his follow-up statements, Dr. King had argued for the importance of enacting federal fair housing legislation.<sup>394</sup> The CFM was the one time in his career that King focused primarily on the issue of fair housing on a sustained basis.<sup>395</sup> His leadership of that Movement made it credible to invoke his name and his memory in pressing for passage of the Fair Housing Act in the immediate aftermath of his death.

The assassination seemed to motivate President Johnson to pursue passage of the bill more aggressively. A charitable version of his actions would suggest that enmities may die with the antagonist's death, particularly if it is a tragic death. A more cynical view of the President's actions is that he decided to exploit King's death for his own political purposes. For whatever reason, Johnson used the occasion of the assassination to press for passage of the civil rights bill in the House.

The morning after King was killed, Johnson sent letters to House Speaker John McCormack and Minority Leader Gerald Ford calling for passage of the fair housing bill: "Last night, America was shocked by a senseless act of violence. A man who devoted his life to the nonviolent achievement of rights that most Americans take for granted was killed by an assassin's bullet. . ."<sup>396</sup> He went on to urge passage of the fair housing act: "I urge the members of the House of

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392. In pressing for passage of the fair housing bill after King's death, Johnson told key congressmen, "It's been sitting too long in the Congress." KOTZ, *supra* note 87, at 417.

393. After King's assassination, Johnson told aides, "We've got to show the nation . . . that we can get something done." *Id.* There is controversy about the extent to which House action on the Civil Rights Act was intended as a way of honoring Dr. King. To the extent it was, it is also unclear how much that depended on his interest in fair housing, as opposed to simply enacting some civil rights legislation in his memory. To the extent it was about fair housing in particular, it is also unclear how much that emphasis is related to Dr. King's involvement in the CFM. It is not a large inferential leap, however, to suggest that Dr. King's fair housing efforts in Chicago less than two years before his death were in the minds of members of Congress and the Administration as they moved the Fair Housing Act toward passage.

394. See *supra* note 391 and accompanying text. This is not to suggest, however, that fair housing legislation was a high priority for King at the time of his death. Instead, he was focused on his newly-developed "Poor People's Campaign"—a campaign more concerned with broad economic justice than housing discrimination specifically. KOTZ, *supra* note 87, at 381. His presence in Memphis in support of the garbage workers' strike represented a shift in his focus to economic issues. *Id.* He was preparing to embark on a major initiative, the Poor People's Campaign, in Washington, D.C., at the time he was shot. Both the goals and the methods of that campaign were highly controversial. *Id.* at 379-87. Moreover, they did not provide an obvious opportunity for a quick Congressional response as did the Fair Housing Act.

395. See *supra* Part I.

396. See KOTZ, *supra* note 87, at 417.

Representatives to rise to this challenge . . . . In your hands lies the power to renew for all Americans the great promise of opportunity and justice under law . . . . The time for action is now.”<sup>397</sup>

However, quick passage would require House concurrence with the Senate version of the bill rather than approval of its own version.<sup>398</sup> The latter course would have required sending the House and Senate versions to a conference committee to resolve the differences between the two houses’ bills.<sup>399</sup> That would have resulted in delay, at least, and perhaps even resulted in another Senate filibuster and ultimate defeat.<sup>400</sup> President Johnson’s announcement on March 31, 1968, that he would not run for re-election created additional uncertainty about what the future would hold for a revised bill.<sup>401</sup> At the same time, Senator Dirksen might have declined to take on the responsibility for facilitating cloture again. Even if he had tried, he might have failed because of his declining influence with his Republican colleagues.<sup>402</sup>

Proponents of the bill, especially fair housing advocates, sought to avoid this uncertain path. Instead, they argued for concurrence with the Senate version, which would send the bill to the President for his signature.<sup>403</sup>

At that stage, President Johnson used his legendary persuasive powers to encourage House members to accept the Senate’s version of the bill. NAACP head Roy Wilkins suggested that “[a]fter Dr. King’s assassination, Congress, [presumably, the House of Representatives] could not resist L.B.J., who pressed harder than ever for passage.”<sup>404</sup>

It is unclear how much of an impact the assassination had on the House decision to concur with the Senate version of the bill rather than going to conference.<sup>405</sup> The House had, of course, passed a fair housing bill in 1966, so the major obstacle seemed to have been overcome when the Senate passed a bill in 1968. However, there were differences between the House’s 1966 version and

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397. *Id.*

398. The civil rights bill was in the hands of the Rules Committee of the House, which would decide whether the House would consider its own bill or vote in concurrence with the Senate version. *Id.* at 417-20.

399. *Id.* at 419-20.

400. See GRAHAM, *supra* note 114, at 271; *infra* note 408 and accompanying text.

401. Tom Wicker, *Johnson Says He Won’t Run*, N.Y. TIMES, Apr. 1, 1968, at 1.

402. *Open Housing, Rights Protection, Rioting, 1968 Legislative Chronology*, in CONGRESS AND THE NATION, 1965-1968, at 378, 387 (1969) [hereinafter *Effective Lobbying Put Bill Across*]; Morales-Doyle, *supra* note 326, at 47-50 (citing HULSEY, *supra* note 324, at 255).

403. GRAHAM, *supra* note 114, at 271-72.

404. ROY WILKINS WITH TOM MATHEWS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS 329 (1994).

405. *Effective Lobbying Put Bill Across*, *supra* note 402, at 388 (describing disagreement among the bill’s opponents and proponents in the House regarding the likelihood that the bill would have gone to conference prior to King’s assassination). One commentator suggests that “[m]ost observers agree that King’s death was critically important in gathering sufficient support for the 1968 fair housing legislation.” BONASTIA, *supra* note 22, at 87.

the Senate's somewhat stronger 1968 version.<sup>406</sup> Moreover, the Senate's bill incorporated other provisions besides fair housing that had not been part of the House-passed 1966 package.<sup>407</sup> Thus, while the House might have passed a bill without King's assassination, the bill might have been different from the Senate's—thus leading to a conference that could have delayed or even killed the fair housing provisions.<sup>408</sup>

King's assassination was certainly on the minds of members of Congress as they decided whether to concur in the Senate bill or pass their own. In the House hearings in the immediate aftermath of King's death, many of the bill's opponents argued for delaying consideration of the bill until a time when emotions were not running so high.<sup>409</sup> They expressed fear that the bill would be passed as a "memorial" to King, rather than after calm, thorough, and thoughtful deliberation.<sup>410</sup> On the other hand, the bill's supporters seemed to avoid references to King, perhaps in order to suggest that the bill should be passed as a matter of principle, rather than in reaction to a tragedy.<sup>411</sup> The opponents' use of King's assassination may have been a last resort tactic to block passage of the bill—an effort that ultimately failed.<sup>412</sup> Just as cloture in the Senate came about by the narrowest of margins, the House Rules Committee approved concurrence with the Senate version by one vote. After approval by the full House, President Johnson completed the surprising passage into law of the Fair Housing Act, just a week after the death of the leader of so many local movements that reverberated

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406. GRAHAM, *supra* note 114, at 271.

407. The Senate's bill included anti-riot provisions and provisions intended to protect Native Americans' civil rights. The anti-riot provisions prohibited traveling in interstate commerce with the intent to incite or participate in a riot and manufacturing, transporting, or teaching the use of firearms and explosives for use in a riot. Morales-Doyle, *supra* note 326, at 15 (citing *Effective Lobbying Put Bill Across*, *supra* note 402, at 382).

408. Morales-Doyle, *supra* note 326, at 52-53; see GRAHAM, *supra* note 114, at 271.

409. *To Prescribe Penalties for Certain Acts of Violence or Intimidation: Hearings on H. Res. 1100 Before the H. Comm. on Rules*, 90th Cong. 56, 59-60 (1968) (statement of Rep. Albert W. Watson). Opponents used this argument in addition to their ongoing arguments about "racial blackmail" and the need to avoid rewarding "Black Power groups . . . burn[ing] our cities." *Id.* at 68 (statement of Rep. Joe D. Waggoner).

410. *Id.* at 69 (statement of Rep. Joe D. Waggoner). Congressman Latta recalled the passage of the Civil Rights Act of 1964, which he viewed as a memorial to President Kennedy, as an inappropriate way for Congress to proceed. *Id.* at 60-61 (statement of Rep. Albert W. Watson). He feared that if Congress passed legislation "on the basis of the fact that a great man died," they would "see many other great men in this country dying just to see legislation passed in the future." *Id.* at 61. Congressman Latta also continued to make the same "chicken and egg" arguments about fair housing laws and riots as mentioned above with regard to the series of riots that took place after King's assassination. *Id.* at 86 (statement of Rep. Charles E. Wiggins).

411. For example, Congressman John Anderson suggested that the bill's supporters had made their decision long before King died. *Id.* at 61 (statement of Rep. Albert W. Watson).

412. *Id.* (statement of Rep. Albert W. Watson); *id.* at 31-32 (statement of Rep. Clark MacGregor) (Rep. Madden discusses the unfairness of the use of the filibuster by the Senate).

across the nation—including the CFM.

### CONCLUSION

Many factors contributed to the failure of the fair housing bill in 1966 and its ultimate passage two years later. So it is extremely difficult to isolate a single one such as the CFM and assess the role that it played in each instance. At the same time, the evidence suggests that the Movement had an impact each time. Ironically, it seemed to undermine efforts to secure passage at the time of the marches in 1966, an unintended consequence directly contrary to the hopes of the Movement's leaders. Mayor Daley's opposition to the Movement hindered it nationally as well as locally, because of his close relationship with President Johnson. Moreover, the violent resistance to the non-violent marches in Chicago failed to generate the kind of public and congressional support that the violence perpetrated on Southern civil rights activists had produced in previous years.

Yet, in still another ironic twist, the CFM seems to have had the opposite effect—the originally intended one—when it came to the ultimate passage of fair housing legislation in 1968. The Movement had raised the consciousness of the major players about the depth and breadth of the problem of housing discrimination. By that time, the Movement in Chicago had ended, Mayor Daley was no longer an obstacle to pressing for passage, Martin Luther King had been assassinated, and the political situation had changed just enough to permit congressional action. Still another piece of the civil rights leader's dream had been realized.



# COX, HALPRIN, AND DISCRIMINATORY MUNICIPAL SERVICES UNDER THE FAIR HOUSING ACT

ROBERT G. SCHWEMM\*

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## INTRODUCTION

When the Federal Fair Housing Act (“FHA”)<sup>1</sup> was passed forty years ago, its proponents saw it as a way of breaking the bonds of race-based ghettos and, with

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1. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968). The FHA, as amended, is codified at 42 U.S.C. §§ 3601-3619 (2000).

them, the limits on blacks' access to equal opportunity in education, suburban jobs, and all other aspects of the American dream.<sup>2</sup> The goal of the FHA was not merely to end housing discrimination based on race and national origin, but to replace the ghettos "by truly integrated and balanced living patterns."<sup>3</sup>

The FHA's goal of integrated communities has not been achieved. Widespread residential segregation remains the norm throughout most of the Nation.<sup>4</sup> As a result, commentators at every decade celebration of the FHA have bemoaned the failure of this law to achieve its goal of changing America's race-based residential patterns.<sup>5</sup>

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2. *See, e.g.*, *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (commenting that the FHA was designed "to prohibit discrimination . . . so that members of minority races would not be condemned to remain in urban ghettos . . . [and] to fulfill . . . the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups"); *see also* congressional hearings cited *infra* notes 261, 278.

3. 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale). Senator Mondale was the FHA's principal sponsor. *Id.* Proponents of the FHA repeatedly argued that this law was intended not only to expand housing opportunities for individual minorities, but also to foster residential integration for the benefit of all Americans. *See id.* (statement of Sen. Mondale) (noting the alienation of whites and blacks caused by the "lack of experience in actually living next" to each other and that "[i]f America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation"); 114 CONG. REC. 9959 (1968) (statement of Rep. Cellar, Chairman of the House Judiciary Committee) (calling for elimination of "the blight of segregated housing patterns"); *see also* *Florence Wagman Roisman, Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 372-86 (2007) (citing other relevant legislative history).

4. Residential segregation is commonly measured on a 100-point "dissimilarity" index, with 100 indicating total segregation (i.e., blacks and whites live separately in racially homogeneous areas) and zero indicating a population that is randomly distributed by race. *See, e.g.*, JOHN LOGAN, LEWIS MUMFORD CTR., ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 2 (2001), available at <http://www.s4.brown.edu/cen2000/WholePop/WPreport/MumfordReport.pdf>. "A value of 60 or above is considered very high." *Id.*

Data from the 2000 census yield a nationwide figure of sixty-four for white-black residential segregation in major metropolitan areas, which was modestly down from sixty-eight in 1990 and seventy-three in 1980. JOHN ICELAND & DANIEL H. WEINBERG, U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000, at 60 (2002), available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/censr-3.pdf](http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf). If this rate of progress were to continue, "it may take forty more years for black-white segregation to come down even to the current level of Hispanic-white segregation." LOGAN, *supra*, at 1. The nationwide figure for Hispanic-white segregation remained at about fifty from 1980 through 2000. ICELAND & WEINBERG, *supra*, at 78.

5. *See, e.g.*, *Fair Housing Act: Hearing on H.R. 3504 and H.R. 7787 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 2-3 (1978) (statement of Rep. Edwards, Chairman, S. Comm. on Civil and Constitutional Rights of H. Comm. on the Judiciary) (noting that "housing segregation and discrimination has [sic] become more

One of the reasons for this disappointing story is that race and national origin discrimination in housing remains pervasive.<sup>6</sup> It has also become apparent, however, that even if full compliance with the FHA were to be achieved, residential integration would still face significant obstacles, including a growing acceptance by African Americans that living in communities where their own race predominates may be preferable to making pioneering moves into white areas. As Professor Calmore wrote fifteen years ago, “blacks increasingly value black community attachment and affiliation at the expense of integration.”<sup>7</sup>

Two other introductory observations are pertinent here. First, 2008, like 1968 when the FHA was passed, is a presidential election year that seems likely to mark a shift in national emphasis on minority rights, played out against the background of an unpopular foreign war. Forty years ago, President Lyndon Johnson, perhaps the greatest advocate of civil rights to occupy the White House in the twentieth century and the original proponent of the FHA, was so weakened by the national strife that accompanied his prosecution of the Vietnam War that his party, so dominant four years earlier, gave way to Republican Richard Nixon. Nixon’s “Southern Strategy” won over to the Republican banner virtually all of the old entrenched white power structure of the South and eventually most of the reactionary forces from all parts of the country, ultimately turning the party of Abraham Lincoln into a bastion of anti-minority sentiment. The success of this

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pervasive and more intractable in the last [ten] years” since “the signing of the bill which committed our government to the elimination of all barriers to equal opportunity in housing”); *THE FAIR HOUSING ACT AFTER TWENTY YEARS* (Robert G. Schwemm ed., 1989) (regarding the twentieth anniversary); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998) (regarding the thirtieth anniversary); John a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 605-08 (2008) (regarding the fortieth anniversary).

6. See, e.g., MARGERY AUSTIN TURNER ET AL., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000*, at i-iv (2002) (reporting on a nationwide testing study showing that whites were favored in rental tests over blacks 21.6% of the time and over Hispanics 25.7% of the time and that whites were favored in sales tests over blacks 17.0% of the time and over Hispanics 19.7% of the time).

7. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1506 (1993); see also id. (“[A] growing segment of the black middle class is voluntarily attaining housing in black areas. This may stem in part from the increase in black alienation from white society that has developed from the late 1960s and into the early 1980s among all segments of the black community.”); Sheryll Cashin, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* xii-xiii, 9-10 (2004) (“Black people . . . have become integration weary. . . . [F]or some of us integration now means a majority-black neighborhood . . . . African Americans are increasingly reluctant to move into neighborhoods without a significant black presence.”); Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 45, 59 (Xavier de Souza Briggs ed., 2005) (reporting “a growing preference among blacks for neighborhoods that are majority same-race, contrary to previously more distinct preferences for 50-50 neighborhoods”).

strategy helped Republicans occupy the White House for most of the next forty years, with presidents characterized by an ever increasing hostility to the civil rights goals of the 1960s and an ever stronger commitment to filling the federal judiciary with anti-civil rights reactionaries. This political era may be coming to an end now, but what will replace it is not yet clear.

A second and related phenomenon is that the modern federal judiciary has grown so hostile to civil rights that decisions narrowing the coverage of the Nation's anti-discrimination laws have become the norm.<sup>8</sup> With respect to the FHA, this trend is reflected in two recent appellate decisions—Judge Posner's 2004 decision for the Seventh Circuit in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*<sup>9</sup> and Judge Higginbotham's 2005 opinion for the Fifth Circuit in *Cox v. City of Dallas*<sup>10</sup>—which took remarkably narrow views of the FHA and are the subject of this Article.

For most of its forty-year history, the FHA has been accorded a generous construction by the courts.<sup>11</sup> These expansive judicial decisions, however, have generally dealt with litigation issues, such as standing to sue and the timeliness of FHA claims.<sup>12</sup> As for its substantive provisions, the FHA has often been interpreted simply by following the doctrine developed under Title VII, the federal employment discrimination law passed four years before the FHA.<sup>13</sup> Many of the FHA's key substantive provisions do track Title VII's language, but

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8. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171-72 (2007) (interpreting Title VII's statute of limitations to cut off plaintiff's claim of long-term sex discrimination); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting) (expressing the view that "no Member of the Court that I joined in 1975 would have agreed with today's decision," which interpreted the Equal Protection Clause to bar race-based efforts to achieve public school integration); see also **THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION** 49-69 (William L. Taylor et al. eds., 2007), available at [http://www.cccr.org/downloads/civil\\_rights2.pdf](http://www.cccr.org/downloads/civil_rights2.pdf) (critiquing the Bush Administration's judicial appointments from a civil rights prospective).

9. 388 F.3d 327 (7th Cir. 2004).

10. 430 F.3d 734 (5th Cir. 2005).

11. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-12 (1972) (noting that the FHA's language is "broad and inclusive," that the statute carries out "a policy that Congress considered to be of the highest priority," and that it should be given "a generous construction"); accord *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (reaffirming *Trafficante*'s view that the FHA is entitled to a "generous construction"); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (commenting on the FHA's "broad remedial intent").

12. For example, the Court in *Trafficante*, 409 U.S. at 209-10, and *Havens*, 455 U.S. at 372-79, extended standing to sue under the FHA to the limits of Article III. In *Havens*, 455 U.S. at 380-81, the Court also recognized the "continuing violation" theory as a way of defeating the statute-of-limitations defense in FHA cases. In *City of Edmonds*, 514 U.S. at 731-37, the Court dealt with an FHA exemption that the Court narrowly construed.

13. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000). For cases interpreting the FHA by referring to Title VII precedents, see ROBERT G. SCHWEMM, **HOUSING DISCRIMINATION: LAW AND LITIGATION** § 7:4 nn.4-5 (2007).

some FHA coverage issues do not have a ready analogy in Title VII law and have, as a result, caused difficulties. One such issue is whether the FHA prohibits the discriminatory provision of municipal services to minority communities, which was the issue presented in *Cox*<sup>14</sup> and which is the main focus of this Article.

Municipalities have always been understood to be proper defendants under the FHA.<sup>15</sup> From the beginning, courts have made clear that the FHA prevents such defendants from operating their public housing projects in racially discriminatory ways<sup>16</sup> and from using their zoning powers to block housing developments on racial grounds.<sup>17</sup> In providing services like garbage removal or police protection, however, municipalities exercise a less direct impact on housing choice, and whether the FHA may be used to challenge the inferior provision of such services to residents of minority neighborhoods is an unsettled issue. This issue is not clearly addressed in the text of the FHA, nor was it discussed in the statute's legislative history. Indeed, the pre-condition for claims of discriminatory municipal services—the existence of identifiable minority-race, ghetto-like neighborhoods—is a situation that the FHA's proponents sought to end.<sup>18</sup>

Both the pre-condition and the claims, however, have continued. In the FHA's first two decades, a handful of courts expressed conflicting views about whether the statute covered discriminatory municipal services.<sup>19</sup> This issue was not dealt with by the Congress that passed the 1988 Fair Housing Amendments Act,<sup>20</sup> but soon thereafter, regulations promulgated by the Department of Housing & Urban Development ("HUD") announced that the FHA did outlaw discriminatory municipal services, at least in some circumstances.<sup>21</sup> With this

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14. 430 F.3d 734 (8th Cir. 2005).

15. *See, e.g.*, *Ventura Vill., Inc. v. City of Minneapolis*, 419 F.3d 725, 727-28 (8th Cir. 2005) (citing numerous cases in support of the proposition that "[v]arious types of municipal actions have been challenged under the FHA . . . [including]: refusal to grant a special-use permit; enforcement of a spacing restriction; denial of government funding needed for a housing project; and enforcement of an ordinance or policy restricting multi-family residences to certain areas of the city or excluding public housing from non-minority neighborhoods" (footnotes omitted)); *see also* SCHWEMM, *supra* note 13, § 12B:5.

16. SCHWEMM, *supra* note 13, § 28:5 n.11 (citing pertinent cases); *see also* *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134-35 (2d Cir. 1973) (opining that the FHA requires consideration of "the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built").

17. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *infra* note 158. *See generally* SCHWEMM, *supra* note 13, §§ 13:8 to -:10.

18. *See supra* note 3 and accompanying text.

19. *See infra* Part II.A.4.

20. Pub. L. 100-430, 102 Stat. 1619 (1988). *See infra* Part II.B.1 for a discussion of the 1988 FHAA's impact on the issue of whether the FHA covers discriminatory municipal services.

21. *See infra* notes 220-27 and accompanying text.

background, Professor Calmore, writing in 1993 on the verge of a new Democratic Administration, argued that “there is tremendous untapped potential to further the goal of spatial equality [i.e., equal treatment for minority communities]” through reliance on the FHA, which, he concluded, “protects not only the person seeking to secure housing on a non-discriminatory basis, but also . . . the right of equal services and facilities once the person actually has secured the housing.”<sup>22</sup>

The courts, however, have continued to take a decidedly mixed view of this matter,<sup>23</sup> and the most recent appellate review of this issue—the Fifth Circuit’s decision in *Cox*<sup>24</sup>—produced a resounding “No.” According to the *Cox* opinion, homeowners in a black neighborhood have no FHA rights to complain that they are receiving inferior municipal services to those enjoyed in comparable white neighborhoods, at least unless the discrimination becomes so egregious that the plaintiffs are “constructively evicted” from their homes.<sup>25</sup> Indeed, a key precedent relied on by *Cox*—the Seventh Circuit’s decision in *Halprin*<sup>26</sup>—suggests that the FHA generally does not provide *any* protection for homeowners, as opposed to homeseekers.<sup>27</sup> Together, *Cox* and *Halprin* marked the first time in four decades that the federal appellate courts have determined that the FHA’s substantive coverage should be significantly narrowed.

This Article deals with *Cox*, *Halprin*, and the issue of whether the FHA should be interpreted to outlaw discrimination in the provision of services by local governments. Part I describes the *Cox* litigation and its connection with *Halprin*. Part II surveys the pre-*Cox* cases that have dealt with discriminatory municipal services. Part III analyzes the FHA’s relevant provisions and their legislative history and concludes that *Cox* and *Halprin* were wrong to deny FHA protection to current residents. Part IV builds on this analysis to provide a sounder approach to FHA claims alleging discriminatory municipal services. Although the result in *Cox* may be defended, this Article’s ultimate conclusion is that the analysis in *Cox* and *Halprin* is so flawed, and in particular has so misconstrued § 3604(b) of the FHA, that it should be rejected by other courts.<sup>28</sup>

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22. Calmore, *supra* note 7, at 1514 (referring to 42 U.S.C. § 3604(b), which is the FHA’s provision outlawing discriminatory housing services and facilities).

23. *See infra* Parts II.A.4, II.B.3.

24. 430 F.3d 734 (5th Cir. 2005).

25. *Id.* at 740-47.

26. 388 F.3d 327 (7th Cir. 2004).

27. *See id.* at 328-30.

28. This comment is not limited to federal courts outside the Fifth and Seventh Circuits, but also includes state courts, which may entertain FHA-based claims, *see* 42 U.S.C. § 3613(a)(1)(A) (2000), and which may also be called upon to interpret their own state or local fair housing laws. Most states and scores of local governments have fair housing laws that are substantially equivalent to the FHA. For a list of these states and localities, see SCHWEMM, *supra* note 13, app. c.

## I. THE COX LITIGATION AND THE HALPRIN ISSUE

### A. Cox v. City of Dallas: *Background*

The *Cox* litigation involved an illegal dump site in the predominantly black neighborhood of Deepwood in Dallas, Texas.<sup>29</sup> Deepwood had been annexed by the City of Dallas in 1956 and zoned residential, but in 1963, the City authorized operation of a gravel pit at an eighty-five-acre site in the neighborhood.<sup>30</sup> Prior to 1963, Deepwood was predominantly white, but during the 1970s, the area changed to predominantly black.<sup>31</sup>

As this racial transition was occurring, the owner of the gravel pit replaced the pit's excavated sand and gravel with solid waste.<sup>32</sup> Beginning in 1982, residents complained to the city that massive illegal dumping was going on at this site.<sup>33</sup> At one point in 1988, "the site caught fire and burned for seven months."<sup>34</sup> At various times, even city contractors used the site to improperly dispose of solid wastes.<sup>35</sup> Another fire broke out and continued to burn for at least two months in 1997.<sup>36</sup> For over twenty-five years, illegal dumping occurred, resulting in substantial deposits of uncovered solid waste, "including household waste, tires, demolition debris, insulation, asphalt shingles, abandoned automobiles, jugs and bottles labeled 'sulfuric acid' and 'nitric acid,' 55-gallon drums, and syringes."<sup>37</sup> Snakes and rats were attracted to the area, and the site was easily

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29. *Cox v. City of Dallas*, 430 F.3d 734, 736 (5th Cir. 2005).

30. *Id.*

31. *Id.*

32. *Id.* *Cox* was one of a number of cases that arose in the 1970s and 1980s alleging that waste dumps were being placed in minority and poor neighborhoods based on intentional discrimination against these groups. *See, e.g.*, Vicki Been, *What's Fairness Got To Do With It? Environmental Justice in the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1004 n.10, 1009-14 (1993) (citing cases and describing studies finding that undesirable land uses were being disproportionately sited in black and poor areas). As Professor Been points out, however, a "chicken-and-egg" issue existed in many of these cases; that is, whether municipalities were allowing hazardous waste sites and other undesirable uses more often in minority neighborhoods because of racial discrimination or whether minorities moved to neighborhoods that had low-priced housing because these areas had earlier been targeted for such uses. *See id.* at 1015-27; *see also* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1383 (1994). The *Cox* case never depended on a resolution of this issue, however, because the minority plaintiffs there alleged that *after* they had become the predominant race in Deepwood, the City discriminated against their neighborhood by allowing illegal dumping to *continue*. *See infra* text accompanying notes 33-47.

33. *Cox*, 430 F.3d at 736.

34. *Id.* at 737.

35. *Id.*

36. *Id.* at 739.

37. *Cox v. City of Dallas*, 256 F.3d 281, 285 (5th Cir. 2001).

accessible to neighborhood children.<sup>38</sup>

During this time, the City undertook a number of steps to limit continued dumping, including twice suing the site's owners (one of whom spent forty-nine days in jail for ignoring an anti-dumping restraining order), issuing scores of code-violation citations, and arresting dozens of people.<sup>39</sup> These enforcement efforts were ultimately characterized by the courts as "inconsistent, inadequate, and largely ineffective,"<sup>40</sup> "erratic," and "ineffectual."<sup>41</sup>

In 1998, residents of Deepwood who had purchased their homes between 1970 and 1978 filed two federal lawsuits against the City and others alleging both civil rights and environmental law violations.<sup>42</sup> The district court dealt with these claims separately.<sup>43</sup> Turning first to the environmental claim under the Resource Conservation and Recovery Act,<sup>44</sup> the court certified an injunctive relief class action on behalf of homeowners near the Deepwood dump site and, after a bench trial, ruled against the City in 1999.<sup>45</sup> The Fifth Circuit affirmed

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38. *Id.* The Fifth Circuit also noted additional effects from the Deepwood dump: resulting fumes polluting the neighborhood air; a significant fire hazard continues to exist at the dump; the State's reports reveal that there is an imminent threat of the discharge of municipal solid waste into Elam Creek, a tributary of the Trinity River, because of the massive illegal dumping; the State itself has noted that waste at the Deepwood dump may cause contamination of surface water and ground water through the leaching of contaminates from the debris by rainwater; asbestos, bezo(a)athracene, and benzene (in excess of state limits) have been detected at the Deepwood dump; and the City itself has long maintained that the Deepwood dump poses a hazard to the public health.

*Id.* at 300.

39. *Cox*, 430 F.3d at 738-39.

40. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*11 (N.D. Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005).

41. *Cox*, 430 F.3d at 737; *see also infra* text accompanying note 60.

42. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 370242, at \*4 (N.D. Tex. Feb. 24, 2004) (describing procedural history of both suits, which were consolidated and later bifurcated).

43. *Id.* (addressing the civil rights claims); *Cox v. City of Dallas*, No. 3:98-CV-0291, 1999 WL 33756551 (N.D. Tex. Aug. 27, 1999), *aff'd*, 256 F.3d 281 (5th Cir. 2001) (addressing environmental law violations).

44. 42 U.S.C. §§ 6901-6992k (2000). This law, *inter alia*, authorizes private litigation against those who have contributed to the prohibited open dumping of solid wastes. *See id.* § 6972(a)(1)(B).

45. *Cox*, 1999 WL 33756551. Certain state defendants were exonerated. *Id.* at \*1. As to the City, the court held that it had, in the words of the statute, *see* 42 U.S.C. § 6972(a)(1)(B), been a "generator" of solid waste "who has contributed to" the "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *See id.* As relief, the court ordered the City, *inter alia*, to erect a fence around the site to exclude unauthorized use; to monitor the site to determine its current hazards and to prevent additional dumping; to remove all solid wastes from the site; and to restore the site "to a condition that is free

this ruling two years later.<sup>46</sup>

As to the civil rights claims, which were not prosecuted as a class action, the plaintiffs alleged racial discrimination, pointing to “two sites located in . . . white neighborhoods where the City did remedy illegal dumping and/or illegal mining.”<sup>47</sup> This discrimination was claimed to violate § 3604(a)<sup>48</sup> and § 3604(b)<sup>49</sup> of the FHA, certain HUD regulations implementing the FHA,<sup>50</sup> the 1866 Civil Rights Act (specifically 42 U.S.C. § 1981),<sup>51</sup> and the Equal Protection Clause of the Fourteenth Amendment (on the basis of which plaintiffs claimed relief under 42 U.S.C. § 1983).<sup>52</sup>

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from hazardous or nuisance conditions.” *Id.* at \*2; *see also* Cox v. City of Dallas, 256 F.3d 281, 288 (5th Cir. 2001).

46. Cox, 256 F.3d at 284.

47. *See Cox*, 2004 WL 370242, at \*11.

48. Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2000). This section of the FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” *Id.*

49. Fair Housing Act § 804(b), 42 U.S.C. § 3604(b) (2000). This section of the FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” *Id.*

50. *See Cox*, 2004 WL 370242, at \*8-9 (citing 24 C.F.R. § 100.70(b) and § 100.70(d)(4), the texts of which are set forth *infra* in, respectively, the text accompanying note 220 and note 219).

51. The 1866 Civil Rights Act is made up of two substantive sections, now codified at 42 U.S.C. § 1981(a) and § 1982, the texts of which are set forth *infra* in, respectively, note 129 and the text accompanying note 131. The former provision, which was relied on in *Cox*, guarantees all persons nondiscrimination in contracts, while § 1982 guarantees all citizens nondiscrimination in property rights. As shown later in this Article, § 1982 has regularly been used to challenge discriminatory municipal services for over three decades, *see infra* Part II.A.2 and notes 150 and 171, and it is unclear why the *Cox* plaintiffs did not rely on § 1982 along with § 1981. The only textual advantage of § 1981 appears to be that it protects “persons within the jurisdiction of the United States,” whereas § 1982 protects only “citizens of the United States,” and perhaps the *Cox* plaintiffs included some non-citizens. *See Plaintiffs’ First Amended Complaint ¶¶ 22, 80*, Cox v. City of Dallas, 2004 WL 370242 (N.D. Tex. Feb. 24, 2004) (No. Civ.A.3:98-CV-1763BH), 1998 WL 35231051 (alleging, as to the plaintiffs, only that they “are African-American homeowners who reside near or adjacent to the illegal Deepwood dump” and citing, as the bases for the plaintiffs’ race discrimination claims, only § 1981 and § 3604(a) of the FHA).

52. *See Cox v. City of Dallas*, 430 F.3d 734, 739 (5th Cir. 2005). 42 U.S.C. § 1983 (2000) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

As to the FHA claims, the district court granted the City's motion for summary judgment in early 2004.<sup>53</sup> It rejected the plaintiffs' § 3604(a) claim on the ground that this provision's ban of discriminatory practices that "make unavailable or den[y]" housing does not cover homeowners who seek to "protect intangible interests in already-owned property, such as habitability or value."<sup>54</sup> The § 3604(b) claim failed because this provision was seen as applying "only to discrimination in the provision of services that precludes the sale or rental of housing[, and p]laintiffs have not alleged discrimination related to the acquisition of their homes."<sup>55</sup> Under these circumstances, the court also rejected the plaintiffs' claim based on HUD's FHA regulations.<sup>56</sup>

At the same time it disposed of these FHA claims, the district court rejected the City's motion for summary judgment on the § 1981 and § 1983 claims,<sup>57</sup> holding that there was sufficient evidence for a trier of fact "to find racially discriminatory intent in the City's failure to stop the illegal dumping"<sup>58</sup> and, as to the additional requirement for municipal liability under § 1983, that there was a triable issue as to "whether the City's failure to terminate the illegal dumping at the Deepwood site was the result of execution of one of its customs or policies."<sup>59</sup> Shortly thereafter, these claims were tried to the court, which issued an opinion later in 2004 in favor of the City, holding that the § 1983 claim failed for lack of proof of an official policy and the § 1981 claim failed because the evidence, while supporting "an inference of gross negligence by the City exemplified by lackadaisical code enforcement, absence of communication between city departments, and virtually no follow-through by either the Board of Adjustment or the City Attorney's office," did not establish "an intent to discriminate against [the plaintiffs] on the basis of race, rather than gross negligence."<sup>60</sup>

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42 U.S.C. § 1983 is the vehicle by which claims based on violations of the U.S. Constitution and certain federal statutes may be asserted. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

53. *Cox*, 2004 WL 370242, at \*14.

54. *Id.* at \*6 (citing *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

55. *Id.* at \*8.

56. *Id.* Once it determined that the plaintiffs' FHA claims should fail, the district court ordered summary judgment against them on their § 1983 claim based on HUD's FHA regulations, concluding that

[e]ven if the Court were to find that the regulations at issue were enforceable through a private cause of action, [p]laintiffs' claims fail as a matter of law for the same reason that their claims under the FHA fail. When regulations authoritatively construe a statute, it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute."

*Id.* at \*8 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)).

57. *Id.* at \*13.

58. *Id.* at \*12.

59. *Id.* at \*13.

60. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*12, 16 (N.D.

### B. Halprin and Post-Acquisition Claims

While the *Cox* plaintiffs were appealing their losses on the FHA and other civil rights claims to the Fifth Circuit, the Seventh Circuit decided *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*.<sup>61</sup> *Halprin* was the first appellate decision to deny that current residents could invoke the protections of §§ 3604(a) and 3604(b), although this position had been taken in a few trial court opinions, including the one in *Cox*.<sup>62</sup>

The plaintiffs in *Halprin* were a couple who owned a home in an area where a homeowners' association provided various services.<sup>63</sup> One of the plaintiffs was Jewish, and the couple alleged that the association, its president, and other association members engaged in a campaign of religious harassment against them that included anti-Jewish epithets, verbal threats, and vandalizing the plaintiffs' property.<sup>64</sup> The couple sued under § 3617 of the FHA,<sup>65</sup> which outlaws interference with persons who have exercised their rights under the FHA's substantive provisions, here §§ 3604(a) and 3604(b).

Judge Posner's opinion concluded that these substantive provisions were concerned only with "access to housing" and that, because the plaintiffs were not complaining "about being prevented from acquiring property," they had "no claim under [§] 3604."<sup>66</sup> *Halprin* conceded that if the defendants had burned down a minority's house, they might have engaged in a form of "constructive eviction" that would make the house "unavailable" under § 3604(a) or deny the homeowner the § 3604(b)-covered "privilege of inhabiting the premises."<sup>67</sup> Short of this extreme example, however, Judge Posner opined that §§ 3604(a) and 3604(b) did not protect current residents. In doing so, he distinguished a number of prior FHA cases brought by current residents, which he dismissed as not

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Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005).

61. 388 F.3d 327 (7th Cir. 2004).

62. *See supra* notes 54-55 and accompanying text; note SCHWEMM, *supra* note 13, § 14:3 para. 1 nn.20-21 (citing relevant cases); *Walton v. Claybridge Homeowners Ass'n*, No. 1:03-CV-69-LTM-WTL, 2004 WL 192106, at \*4 (S.D. Ind. Jan. 22, 2004), *aff'd*, 191 F. App'x 446 (7th Cir. 2006); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989).

63. 388 F.3d at 328.

64. *Id.*

65. Fair Housing Act § 817, 42 U.S.C. § 3617 (2000). Section 3617 provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. § 3617.

66. 388 F.3d at 329-30.

67. *Id.* at 329. "Constructive eviction" generally refers to a "landlord's act of making premises unfit for occupancy, often with the result that the tenant is compelled to leave." BLACK'S LAW DICTIONARY 594 (8th ed. 2004).

having “contain[ed] a *considered* holding on the scope of the Fair Housing Act.”<sup>68</sup> Judge Posner also refused to interpret the FHA as broadly as Title VII, which he recognized “protects the job holder as well as the job applicant.”<sup>69</sup> The FHA’s language is different, he noted, concluding that this difference reflects the fact that Congress’s concern in the housing statute extends only to the property-acquiring stage and ceases once persons are “allowed to own or rent homes.”<sup>70</sup> Thus, the *Halprin* plaintiffs, as current homeowners whose complaint was that the defendants were harassing them on discriminatory grounds, could not assert a claim relating to the “sale or rental” of their dwelling in violation of either § 3604(a) and § 3604(b).<sup>71</sup>

Having determined that current homeowners have no § 3604 rights—other than possibly not to be burned out or otherwise constructively evicted from their homes—*Halprin* strongly suggested that the anti-interference guarantee of § 3617 could also not be invoked by such plaintiffs.<sup>72</sup> However, because of two special circumstances in *Halprin*, the plaintiffs’ § 3617 claim was upheld.<sup>73</sup> First, HUD’s regulation interpreting § 3617 extends to interference with “enjoyment of a dwelling,”<sup>74</sup> which *Halprin* conceded “can take place after the dwelling has been acquired.”<sup>75</sup> This regulation, Judge Posner argued, goes well beyond § 3617’s language and may therefore be invalid “because that section provides legal protection only against acts that interfere with one or more of the other sections of the Act,” which he had earlier held “is not addressed to post-acquisition discrimination.”<sup>76</sup> Second, the *Halprin* defendants had not challenged this regulation’s validity, and therefore the Seventh Circuit held that the plaintiffs’ § 3617 claim survived.<sup>77</sup> Still, the clear implication of this part of *Halprin* is that in future cases brought by current residents, defendants may challenge the HUD regulation, and, if successful, defeat a post-acquisition interference claim under § 3617.<sup>78</sup>

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68. 388 F.3d at 329 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993)).

69. *Id.*

70. *Id.*

71. *Id.* at 329-30.

72. *Id.* at 330.

73. *Id.*

74. 24 C.F.R. § 100.400(c)(2) (2007). This regulation provides that conduct made unlawful by § 3617 includes “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.” *Id.*

75. 388 F.3d at 330.

76. *Id.*

77. *Id.*

78. On remand, the district court upheld HUD’s regulation, thereby preserving the plaintiffs’ § 3617 claim. *See Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, No. O1 C

The *Halprin* opinion may be criticized on a variety of grounds, many of which I have identified elsewhere.<sup>79</sup> Furthermore, the Justice Department and HUD have taken the position in their FHA-enforcement litigation that *Halprin* was wrong in holding that § 3604 does not apply to post-acquisition discrimination.<sup>80</sup> *Halprin*'s flaws have also been discussed in two fine articles, one by Professor Short dealing primarily with harassment cases under the FHA<sup>81</sup> and one by Professor Oliveri dealing more broadly with the FHA's coverage in § 3604.<sup>82</sup> Among the identified failures of Judge Posner's opinion in *Halprin* are: (1) its cavalier dismissal of prior case law, which had generally assumed that § 3604(b) does protect residents from discriminatory treatment after they have acquired their homes;<sup>83</sup> (2) its failure to confront HUD regulations interpreting

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4673, 2006 WL 2506223, at \*1 (N.D. Ill. June 28, 2006). Other post-*Halprin* decisions have generally agreed that this regulation is valid. *See, e.g.*, *George v. Colony Lake Prop. Owners Ass'n*, No. 1:05 CV-05899, 2006 WL 1735345, at \*2-3 (N.D. Ill. June 16, 2006); *King v. Metcalf 56 Homes Ass'n*, 385 F. Supp. 2d 1137, 1144 (D. Kan. 2005); *United States v. Altmayer*, 368 F. Supp. 2d 862, 863 (N.D. Ill. 2005); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*6 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 978-80 (D. Neb. 2004). The only exception seems to be *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. CIV.A. H-05-3197, 2005 WL 2669480, at \*4 n.4 (S.D. Tex. Oct. 19, 2005) (rejecting current resident's § 3617 claim, which was brought pro se, and adopting the view that "24 C.F.R. § 100.400(c)(2) is invalid").

As is implicit in the *Altmayer* and *Koch* decisions, the Justice Department has actively defended HUD's view that § 3617 covers post-acquisition claims. *See generally Altmayer*, 368 F. Supp. 2d 862; *Koch*, 352 F. Supp. 2d 970. For its part, the Seventh Circuit has twice after *Halprin* avoided ruling on the regulation's validity by finding that the defendant, as in *Halprin*, waived this issue and then ruling against the plaintiff-resident's § 3617 claim on the merits. *See Walton v. Claybridge Homeowners Ass'n*, 191 F. App'x 446, 450-52 (7th Cir. 2006); *East-Miller v. Lake County Highway Dep't*, 421 F.3d 558, 562-64 & n.1 (7th Cir. 2005).

79. *See SCHWEMM, supra* note 13, § 14:3 nn.10-42 and accompanying text.

80. *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Plaintiffs' Opposition to Defendant's 12(b)(6) Motion to Dismiss at n.3, *George v. Colony Lake Prop. Owners Ass'n*, No. 1:05-CV-05899, 2006 WL 1735345 (N.D. Ill. June 16, 2006), 2006 WL 1437953 (stating the Justice Department's belief "that [§] 3604 applies to post-acquisition discrimination" and its disagreement with *Halprin*'s contrary conclusion); Press Release, U.S. Dep't of Hous. & Urban Dev., *HUD Charges Virginia Beach Landlord with Violating the Fair Housing Act: Owner Accused of Treating Black Families Worse, Using Racial Slurs* (May 17, 2007), *available at* <http://www.hud.gov/news/release.cfm?content=pr07-067.cfm> (describing HUD's charge accusing apartment owner of violating the FHA by, *inter alia*, "subjecting African-American tenants to stricter rules than others").

81. *See Aric Short, Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

82. *See Rigel C. Oliveri, Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008).

83. *See, e.g.*, *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1263-64 (11th Cir. 2002) (dealing with sexual harassment); *Hous. Rights Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1192-93 (C.D. Cal.

§§ 3604(a) and 3604(b) to apply to discrimination against current residents;<sup>84</sup> (3) its misreading of the FHA's legislative history to indicate a concern only with access to housing;<sup>85</sup> (4) its lack of awareness of the impact of the 1988 Fair Housing Amendments Act;<sup>86</sup> (5) its refusal to interpret the FHA in line with Title VII doctrine;<sup>87</sup> and (6) its failure to see how its narrow interpretation of the FHA would frustrate the statute's policy goals.<sup>88</sup>

Despite these flaws,<sup>89</sup> Judge Posner's ultimate conclusion in *Halprin* that the

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2004) (dealing with racial and national origin harassment); N.D. Fair Hous. Council, Inc. v. Allen, 319 F. Supp. 2d 972, 974, 980-81 (D.N.D. 2004) (dealing with racial harassment); Texas v. Crest Asset Mgmt., Inc., 85 F. Supp. 2d 722, 730-33 (S.D. Tex. 2000) (dealing with national origin harassment); Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1292-93 (C.D. Cal. 1997) (dealing with restricting families with children from using apartment complex's swimming pool); Reeves v. Carrollsburg Condo. Owners Ass'n, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at \*5-8 (D.D.C. Dec. 16, 1997) (dealing with race and sexual harassment); United States v. Sea Winds of Marco, Inc., 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (upholding § 3604(b) claim based on allegation that condominium enforced a renter-identification and monitoring policy only against Hispanic tenants); Concerned Tenants Ass'n v. Indian Trails Apartments, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980) (upholding § 3604(b) claim against landlord who provided poorer services over a period of time as its tenants changed from white to black); HUD v. Jerrard, Fair Housing—Fair Lending Rep. (Aspen) ¶ 25,005, at 25,090 (HUD ALJ Sept. 28, 1990) (dealing with race-based harassment and rent increase); HUD v. Murphy, Fair Housing—Fair Lending Rep. (Aspen) ¶ 25,002, at 25,053 (HUD ALJ July 13, 1990) (holding that § 3604(b)'s ban on familial status discrimination was violated by mobile home park that precluded current tenants from building a clubhouse for their children and by maintaining the playground in an unsafe and unusable condition for children); *see also* cases cited *infra* notes 174, 180, and 241 (pre-*Halprin* decisions suggesting or holding that § 3604(b) covers claims by residents of minority neighborhoods alleging discriminatory municipal services); sources cited in SCHWEMM, *supra* note 13, § 14:3 nn.3 & 5; sources cited *id.* § 14:3 n.26 (dealing with sexual harassment).

As the court stated with respect to § 3604(b) in *Housing Rights Center v. Sterling*: "The FHA thus not only demands that tenants be able to secure an apartment on a nondiscriminatory basis, but also 'guarantees their right to equal treatment once they have become residents of that housing.'" 404 F. Supp. 2d at 1192 (quoting *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1148 (C.D. Cal. 2001)).

84. *See, e.g.*, Oliveri, *supra* note 82, at 13-16. Since 1989, HUD regulations interpreting § 3604(b) have identified a number of practices banned by this provision that affect current residents. *See, e.g.*, 24 C.F.R. § 100.65(b)(2), (4) (2007) (both of which were promulgated at 54 Fed. Reg. 3232, 3285 (Jan. 23, 1989) and are quoted *infra* note 217 and accompanying text).

85. *See* Oliveri, *supra* note 82, at 18-21, 25-32; Short, *supra* note 81, at 222-39; *infra* Part III.B.

86. *See* *infra* Part II.B.1.

87. *See* Oliveri, *supra* note 82, at 24-25; Short, *supra* note 81, at 240-44; *infra* Part III.C.1.

88. *See* Oliveri, *supra* note 82, at 25-32, 62; Short, *supra* note 81, at 250-54; *infra* notes 271-78 and accompanying text.

89. In addition to the reasons discussed in the text, the *Halprin* court's narrow reading of § 3604(b) is inconsistent with the long-held view that the FHA should be given a broad interpretation.

FHA does not cover post-acquisition discrimination may still be correct if it is an accurate reading of the statutory language used in §§ 3604(a) and 3604(b). This language is, of course, the primary consideration in interpreting these provisions.<sup>90</sup> As will be discussed in more detail later, the statutory language may justify an interpretation of § 3604(a) that is limited to the acquisition of housing, but § 3604(b)'s terms are far more ambiguous on this issue.<sup>91</sup>

### C. The Fifth Circuit's 2005 Decision in Cox

The FHA and other civil rights aspects of *Cox* were argued to the Fifth Circuit after the *Halprin* decision. On November 9, 2005, the Fifth Circuit affirmed the defendants' victory on all counts in an opinion by Judge Higginbotham.<sup>92</sup>

As to the FHA, the Fifth Circuit rejected the plaintiffs' "make unavailable or deny" claim under § 3604(a), concluding that: "The failure of the City to police the Deepwood landfill may have harmed the housing market, decreased home values, or adversely impacted homeowners' 'intangible interests,' but such results do not make dwellings 'unavailable' within the meaning of the Act."<sup>93</sup> The court concluded, based on a review of *Halprin* and other decisions, that "the simple language of § 3604(a) does not apply to current homeowners whose complaint is that the value or 'habitability' of their houses has decreased because such a complaint is not about 'availability.'"<sup>94</sup> Judge Higginbotham recognized—as *Halprin* had<sup>95</sup>—that a defendant's discrimination could have such a devastating effect on a homeowner that the latter might have a § 3604(a) claim for "constructive eviction,"<sup>96</sup> but he held that current owners have no right under § 3604(a) based on the claim that "the value or 'habitability' of their property has decreased due to discrimination in the delivery of protective city services."<sup>97</sup>

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See SCHWEMM, *supra* note 13, § 7:2; *supra* note 11 and accompanying text; *see also* SCHWEMM, *supra* note 13, § 14:3 n.10 (elaborating on this principle to criticize the *Halprin* court's misuse of the FHA's legislative history).

90. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("[T]he starting point in every case involving the construction of a statute is the language itself.") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *see also infra* note 255 and accompanying text.

91. *See infra* Part III.

92. *Cox v. City of Dallas*, 430 F.3d 734, 736 (5th Cir. 2005).

93. *Id.* at 740.

94. *Id.* at 741 (referring, *inter alia*, to the Fourth Circuit's decision in *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (described *infra* notes 231 and 234 and the text accompanying note 237) and the Third Circuit's decision in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (described *infra* note 231)).

95. *See supra* note 67 and accompanying text.

96. 430 F.3d at 742-43 & nn.20-21.

97. *Id.* at 742-43 (footnote omitted).

As for the plaintiffs' § 3604(b) claim, the Fifth Circuit held that, even were the City's action considered a "service" under this provision, "§ 3604(b) is inapplicable here because the service was not 'connected' to the sale or rental of a dwelling as the statute requires."<sup>98</sup> To accept the plaintiffs' argument that § 3604(b)'s "services" need not be connected with a sale or rental would, according to the *Cox* opinion, turn the FHA into a "general anti-discrimination [statute], creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area."<sup>99</sup> Judge Higginbotham wrote that the FHA must "remain[] a housing statute. . . . That the corrosive bite of racial discrimination may soak into all facets of black lives cannot be gainsaid, but this statute targets only housing."<sup>100</sup> Thus, § 3604(b), while available to homeowners whose complaints deal with discrimination in the initial purchase of their homes or their actual or constructive eviction therefrom, "does not aid plaintiffs, whose complaint is that the value or 'habitability' of their houses has decreased."<sup>101</sup>

Finally, as to the *Cox* plaintiffs' § 1981 and equal protection claims, the Fifth Circuit held that the trial judge's findings that the plaintiffs' proof failed to show official action or discriminatory intent were not clearly erroneous.<sup>102</sup> The appellate court opined that municipal liability under both § 1981 and the Equal Protection Clause requires proof that the violation of the plaintiff's rights resulted from an official policy or custom.<sup>103</sup> It held that, although the district court correctly concluded that "'the City's efforts to stop the illegal dumping at Deepwood were inconsistent, inadequate, and largely ineffective for years,'" those efforts only "amounted to 'negligence,' not a custom."<sup>104</sup>

The *Cox* plaintiffs sought rehearing en banc, which the Fifth Circuit denied in late 2005.<sup>105</sup> Thereafter, the plaintiffs filed a petition for certiorari with the Supreme Court, seeking review only of the ruling on their FHA claim,<sup>106</sup> but the

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98. *Id.* at 745. The court's opinion in *Cox* noted what it viewed as a split among the circuits as to whether the City's enforcement of its zoning laws could be considered a service for purposes of § 3604(b). *Id.* at 745 n.34. This part of the *Cox* opinion is further discussed *infra* note 369 and accompanying text.

99. 430 F.3d at 746.

100. *Id.*

101. *Id.*

102. *Id.* at 747-49.

103. *Id.* at 748. This part of the appellate opinion in *Cox* is further discussed *infra* note 373 and accompanying text.

104. 430 F.3d at 749 (footnotes omitted).

105. *See Cox v. City of Dallas*, 166 F. App'x 163 (5th Cir. 2005) (unpublished table decision).

106. *See* Petition for Writ of Certiorari, at \*i, *Cox*, 547 U.S. 1130 (2006) (No. 05-1226), 2006 WL 755783. The question presented by this petition was

[w]hether black homeowners are denied the protection of an aggrieved persons claim [sic] under the Fair Housing Act, 42 U.S.C. § 3604, solely because they already own their homes where they allege their homes have been made ineligible for sale because of the conditions created by the City's racially discriminatory provision of zoning

Court denied this petition on May 15, 2006.<sup>107</sup>

## II. PRE-COX LAW INVOLVING DISCRIMINATORY MUNICIPAL SERVICES

Litigation accusing municipalities of providing inferior services to minority communities dates back at least to the 1960s and continues to the present day.<sup>108</sup> This Part reviews the pre-*Cox* cases involving discriminatory municipal services. As in *Cox*, the plaintiffs in these cases often invoked the Equal Protection Clause and other civil rights laws, as well as the FHA. Indeed, decisions opining on the FHA's applicability to such cases generally came after the availability of these other legal theories had become well established.

### A. The 1968-1988 Period

1. *Equal Protection Claims*: *Hawkins v. Town of Shaw and Its Progeny*.—In the early 1970s, the Fifth Circuit ruled in *Hawkins v. Town of Shaw*<sup>109</sup> that the defendants' practice of providing inferior municipal services to black neighborhoods violated the Equal Protection Clause.<sup>110</sup> Shaw's 1500 black and 1000 white residents were residentially segregated, with 97% of the black-occupied homes being located in neighborhoods where no whites resided<sup>111</sup> and where dramatically inferior municipal services were provided.<sup>112</sup> Shaw's black residents sought injunctive relief against the relevant Town officials under 42 U.S.C. § 1983<sup>113</sup> in a class action filed before the FHA became effective.<sup>114</sup>

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enforcement and other municipal services?

*Id.*

107. *Cox*, 547 U.S. 1130.

108. For examples of modern cases, *see infra* note 398.

109. 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g en banc*, 461 F.2d 1171 (5th Cir. 1972).

110. *Id.* at 1291-92.

111. *Id.* at 1288.

112. The evidence showed that: (1) blacks accounted for 98% of all persons "who live[d] in homes fronting on unpaved streets"; (2) high-power street lights were installed only in white areas; (3) "while 99% of white residents [were] served by a sanitary sewer system, nearly 20% of the black population" was not; (4) while the drainage problems in white communities had been addressed by underground storm sewers or drainage ditches, black neighborhoods had only a "poorly maintained system of drainage ditches" or none at all; and (5) water pressure was inadequate far more often in black than white neighborhoods. *Id.* at 1289-91.

113. *See supra* note 52. During this time, the prevailing view of § 1983 was that it covered local officials, but not municipalities. *See Monroe v. Pape*, 365 U.S. 167 (1961), 187-92, *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). In 1978, after the *Hawkins* litigation had ended, the Supreme Court changed its interpretation of § 1983 to permit claims against municipalities as well as their officials. *See Monell*, 436 U.S. 658.

114. *See Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1163 n.1 (N.D. Miss. 1969) (referring to an early order in the case dated July 12, 1968). The FHA became effective as to most non-governmental housing on January 1, 1969. *See* Fair Housing Act § 803(a)(2), 42 U.S.C. § 3603(a)(2) (2000).

In 1969, the district court ruled for the defendants, concluding that their “policy of slowly providing basic municipal services to the town’s inhabitants”<sup>115</sup> was not based on race, but on fiscal conservatism and other “rational considerations.”<sup>116</sup> In 1971, a panel of the Fifth Circuit reversed, holding that the demonstrated racial differences in municipal services required a compelling justification that the defendants had failed to provide.<sup>117</sup> The panel held that this violated the Equal Protection Clause, and the defendants were ordered to submit a remedial plan “to cure the results of [this] long history of discrimination.”<sup>118</sup> A year later, the Fifth Circuit, sitting en banc, affirmed this judgment and order.<sup>119</sup>

Both the panel and en banc decisions rejected the defendants’ argument that, because their inferior treatment of black neighborhoods was not shown to have been prompted by discriminatory intent, no equal protection violation was established.<sup>120</sup> As the en banc opinion put it: “In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials.”<sup>121</sup> This view would ultimately be rejected by the Supreme Court in 1975 in *Washington v. Davis*,<sup>122</sup> which adopted a purposeful discrimination requirement for equal protection claims.<sup>123</sup>

Even with this intent requirement, however, a number of cases patterned after *Hawkins* were successfully prosecuted in the South under the Equal Protection Clause in the late 1970s and early 1980s.<sup>124</sup> Like *Hawkins*, these cases often

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115. *Hawkins*, 303 F. Supp. at 1168.

116. *Id.* at 1168-69.

117. *Hawkins*, 437 F.2d at 1292. At the trial court level, the *Hawkins* plaintiffs alleged wealth, as well as race, discrimination, but they did not pursue their wealth-based claim on appeal. *Id.* at 1287 n.1.

118. *Id.* at 1293.

119. *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972).

120. See *id.* at 1172-73 (en banc opinion); 437 F.2d at 1291-92 (panel opinion).

121. *Hawkins*, 461 F.2d at 1172.

122. 426 U.S. 229 (1976).

123. *Id.* at 238-48. In *Washington*, the Supreme Court cited *Hawkins* with disapproval as an example of an equal protection decision based on discriminatory effect instead of discriminatory purpose. *Id.* at 244 n.12. For examples of post-*Washington* appellate decisions recognizing that equal protection challenges to discriminatory municipal services now require proof of the defendant’s discriminatory intent, see *Ammons v. Dade City*, 783 F.2d 982, 987 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185-86 (11th Cir. 1983).

124. See, e.g., *Ammons*, 783 F.2d at 983 (affirming judgment in a class action filed in 1981 based on finding that defendants intentionally discriminated in providing inferior street paving and related services and storm water drainage facilities to black neighborhoods in violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 573, 590 (M.D. Fla. 1986) (finding in a class action filed in 1981 that defendants intentionally discriminated in providing inferior street paving and related services to black neighborhoods in violation of the Equal Protection Clause); *Bryant v. City of Marianna*, 532 F. Supp. 133, 135 (N.D. Fla. 1982) (entering default judgment in a class action filed in 1980 based

revealed municipal discrimination against black neighborhoods that dated back to the Jim Crow era, making discriminatory intent easy to infer. The *Hawkins* theory was also endorsed by a few courts outside of the South in the 1970s, but these cases generally resulted in judgments for the municipal defendants based on insufficient evidence of illegal discrimination.<sup>125</sup> In 1981, the Supreme Court appeared to approve the *Hawkins* theory, at least for intent-based claims, when it commented that a municipality could not take “action benefitting white property owners that would be refused to similarly situated black property owners.”<sup>126</sup>

2. § 1982 *Claims and City of Memphis v. Greene*.—Two months after passage of the 1968 FHA, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*<sup>127</sup> that the 1866 Civil Rights Act (42 U.S.C. § 1981 and § 1982) outlaws private, as well as public, discrimination in housing.<sup>128</sup> Although the *Jones* opinion cited § 1981’s right to “contract,”<sup>129</sup> its main focus was § 1982’s

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on defendants’ discrimination in providing inferior street paving and maintenance, water and sewer services, drainage facilities, fire protection, parks and recreation facilities, and street lighting to black neighborhoods in violation of the Equal Protection Clause and Title VI); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1376-79 (M.D. Fla. 1978) (finding in a class action filed in 1976 that defendants intentionally discriminated in providing inferior street paving, parks and recreation facilities, and water service to black neighborhoods in violation of the Equal Protection Clause and Title VI); *Selmont Improvement Ass’n v. Dallas County Comm’n*, 339 F. Supp. 477, 481 (S.D. Ala. 1972) (ruling for plaintiffs under the *Hawkins* theory based on defendants’ discrimination in providing inferior street paving to black neighborhoods); *see also Campbell v. Bowlin*, 724 F.2d 484, 489-90 (5th Cir. 1984) (reversing directed verdict for defendants in § 1983 claim against municipality and its officials who were accused of denying water and sewer facilities to plaintiff’s land in a predominantly black neighborhood based on intentional discrimination).

125. *See, e.g., Beal v. Lindsay*, 468 F.2d 287, 288-91 (2d Cir. 1972) (accepting the *Hawkins* “principle that serious and continued discrimination in the level of effort expended on municipal services to areas predominantly populated by minority racial groups violates the equal protection clause,” but affirming ruling in favor of defendants because their failure to maintain a particular park in a minority area was based not on their lack of effort, but continuous vandalism); *Burner v. Washington*, 399 F. Supp. 44, 46, 54 (D.D.C. 1975) (accepting *Hawkins* as the “leading case on discrimination in the provision of municipal services,” but holding that the plaintiffs had failed to show illegal racial discrimination in police, fire, recreation services, trash removal, and sidewalk construction); *see also Mlikotin v. City of L.A.*, 643 F.2d 652, 653-54 (9th Cir. 1981) (affirming dismissal of equal protection claim of inferior municipal services to poor neighborhood because this claim, unlike the one in *Hawkins*, was not based on racial discrimination).

126. *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981) (§ 1982 case). This case is discussed *infra* notes 134-48 and accompanying text.

127. 392 U.S. 409 (1968).

128. *Id.* at 419-44.

129. *See id.* at 441-43. At the time of *Jones*, § 1981 provided:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and

guarantee of equal property rights,<sup>130</sup> which provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>131</sup>

*Jones* resurrected § 1981 and § 1982 as legal weapons against private discrimination, but even before *Jones*, the 1866 Act was understood to outlaw governmental discrimination.<sup>132</sup> Furthermore, in post-*Jones* cases, the Supreme Court has made clear that § 1982 guarantees equal treatment in the terms and conditions affecting a resident’s property rights, as well as in the initial opportunity to purchase and lease.<sup>133</sup>

The principal Supreme Court case involving a § 1982 claim by minority homeowners challenging discriminatory municipal services is *City of Memphis v. Greene*,<sup>134</sup> which was decided in 1981. In *City of Memphis*, residents of a black neighborhood claimed that closing a street that linked them to a neighboring white area adversely affected their rights to hold and enjoy their property in violation of § 1982.<sup>135</sup> In a 6-3 decision, the Supreme Court rejected this claim. Justice Stevens, writing for five members of the Court,<sup>136</sup> reviewed

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property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, taxes, licenses, and exactions of every kind, and to no other.

*See Civil Rights Act of 1991*, Pub. L. No. 102-166, § 1981, 105 Stat. 1071, 1071-72 (1991). As a result of amendments made to § 1981 by the Civil Rights Act of 1991, the quoted language became 42 U.S.C. § 1981(a), with two additional subsections providing, respectively, that the term “‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” and that the rights protected by this provision extend to private, as well as public, discrimination. *See* 42 U.S.C. § 1981(a) (2000).

130. *See* 392 U.S. at 412-13.

131. 42 U.S.C. § 1982 (2000).

132. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 30 (1948) (holding that § 1982 bars “judicial enforcement of [racially] restrictive covenants by the courts of the District of Columbia”); *Buchanan v. Warley*, 245 U.S. 60, 78-82 (1917) (relying on the 1866 Act, along with the Fourteenth Amendment, to strike down a municipal zoning ordinance that required residential racial segregation).

133. *See Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431, 435-37 (1973) (holding that § 1982 guarantees a black purchaser of residential property the opportunity to join a local recreation club that ties membership benefits to residency in the area); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234-38 (1969) (holding that § 1982 guarantees a black tenant the right to obtain a membership share in a local recreational facility that ties membership to residency in neighboring homes). *Tillman* is further discussed *infra* notes 346-48 and accompanying text. *Sullivan* is further discussed *infra* notes 333-39 and accompanying text.

134. 451 U.S. 100 (1981).

135. *Id.* at 105.

136. Justice White concurred on another ground. *Id.* at 129-35 (White, J., concurring). Justice Marshall, joined by Justices Brennan and Blackmun, dissented. *Id.* at 135-55 (Marshall, J., assenting).

the record and determined that the City's decision was motivated not by racial factors, but by traffic safety and other legitimate considerations.<sup>137</sup> He also found that the street closing conferred a benefit on property owners in the white neighborhood, but that there was no evidence that the City would refuse to do the same for black property owners.<sup>138</sup> It was acknowledged that the closing caused some inconvenience to black motorists who now had to find other routes around the white neighborhood,<sup>139</sup> but Justice Stevens termed this "a routine burden of citizenship"<sup>140</sup> that had not affected the value of any property owned by the plaintiffs.<sup>141</sup> Based on this view of the record,<sup>142</sup> Justice Stevens concluded that no § 1982 violation had been shown.<sup>143</sup>

Even though the Court in *City of Memphis* rejected the plaintiffs' particular claim, it did recognize three separate theories upon which § 1982-based challenges to governmental action might succeed.<sup>144</sup> The first of these covers claims of discriminatory municipal services: "[T]he statute would support a challenge to municipal action benefitting white property owners that would be refused to similarly situated black property owners. For official action of that kind would prevent blacks from exercising the same property rights as whites."<sup>145</sup> The second theory recognized in *City of Memphis* involves "official action that depreciated the value of property owned by black citizens."<sup>146</sup> "Finally, the statute might be violated if the street closing severely restricted access to black homes, because blacks would then be hampered in the use of their property."<sup>147</sup>

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137. *Id.* at 119 (majority opinion).

138. *Id.*

139. *Id.* at 128.

140. *Id.* at 129.

141. *Id.* at 124, 129.

142. Justice Marshall's dissent provided a much different view of the record, which led him to conclude that the City's actions had violated § 1982. *Id.* at 136-54 (Marshall, J., dissenting).

143. *Id.* at 124 (majority).

144. *See id.* at 123.

145. *Id.*

146. *Id.* For a post-*City of Memphis* example of such a claim, see *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1536 (11th Cir. 1986) (ruling against black property owners' § 1982 claim on the ground that the plaintiffs "suffered zero damages from the [defendants'] closing of Industrial Boulevard").

147. *City of Memphis*, 451 U.S. at 123. Here, the *City of Memphis* opinion cited with apparent approval the Fifth Circuit's decision in *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974), as an example of this theory:

In *Jennings*, the defendants placed a barricade across a street on the outskirts of Dadeville, Ala., and prohibited landowners on the other side of the barricade from using the street. All but one of the landowners so restricted were black, and the one white landowner was given private access to the closed street. The street closing had the effect of adding [one-and-one-half] to [two] miles to the trip into town. The court held that the plaintiffs, "because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens." Thus *Jennings*, unlike this case,

The *City of Memphis* case also presented the issue of whether § 1982 requires proof that the defendant's actions are motivated by a discriminatory purpose, but the Court did not decide this issue.<sup>148</sup> A year later, however, the Court held that § 1981 claims do require such proof,<sup>149</sup> and subsequent lower court decisions have assumed that § 1982 is subject to the same requirement.<sup>150</sup> Thus, even though the *City of Memphis* opinion endorsed the use of § 1982 for some types of discriminatory municipal services claims, such claims, like those under the Equal Protection Clause, now require proof of discriminatory intent.<sup>151</sup>

3. *Title VI*.—Cases dating back to the 1970s have upheld discriminatory municipal services claims based on Title VI of the 1964 Civil Rights Act,<sup>152</sup> which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.”<sup>153</sup> Since those earlier days, Title VI law has undergone some important changes, and although private litigants may sue

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involved a severe restriction on the access to property.

451 U.S. at 123 n.36 (quoting *Jennings*, 488 F.2d at 442). Thus, discriminatory municipal actions that impose the kind of hardships on black homeowners that occurred in *Jennings* may be challenged under § 1982. For a post-*City of Memphis* “road-closing-access-to-property” case where the Fifth Circuit relied on *Jennings* to uphold a § 1982 claim, see *Evans v. Tubbe*, 657 F.2d 661, 662 n.2 (5th Cir. 1981).

148. See *City of Memphis*, 451 U.S. at 129-30 (White, J., concurring).

149. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382-91 (1982).

150. See SCHWEMM, *supra* note 13, § 27:19 n.12 and accompanying text.

151. Modern lower court cases, in addition to *Cox*, where the 1866 Act has been relied on as a basis for challenging discriminatory municipal services include *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492-98 (S.D. Ohio 2007) (described *infra* note 398); *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*2 (N.D. Tex. Feb. 14, 2002) (denying summary judgment for defendants in § 1981 claim alleging discrimination in various municipal services and judging this claim by the same standards as an equal protection claim under § 1983); *see also* *Franks v. Ross*, 313 F.3d 184, 194-96 (4th Cir. 2002) (upholding timeliness of § 1982 claim brought by residents of black town claiming that the county was siting an undesirable landfill nearby based on race); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1211-12 (7th Cir. 1984) (rejecting claims based on, *inter alia*, § 1981 and § 1982 (discussed *infra* note 171)); *cf. Ross v. Midland Mgmt. Co.*, No. 02-C-8190, 2003 WL 21801023, at \*2-4 (N.D. Ill. Aug. 1, 2003) (reading *City of Memphis* as holding that § 1982 creates “a right of action not only with respect to the purchase of property but also with respect to the use of property” and therefore upholding tenant’s discriminatory services claim under § 1982).

152. 42 U.S.C. § 2000d (2000).

153. *Id.* The cases include those so designated in *supra* note 124; those cited *infra* notes 157 and 236; and *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1014-17 (6th Cir. 1989) (upholding standing of neighborhood organization to bring a Title VI complaint alleging that their members’ property values were reduced because defendant “provides municipal services . . . to racially identifiable neighborhoods in a substantially inferior quality and quantity than the services provided to other areas of Canton”).

under this statute,<sup>154</sup> their claims are now limited to intent-based discrimination.<sup>155</sup> Furthermore, a defendant accused of such discrimination must be a recipient of federal financial assistance.<sup>156</sup> Thus, plaintiffs bringing municipal services claims under Title VI must show that the defendant-municipality received federal financial assistance and has “discriminated against them on the basis of race, the discrimination was intentional, and the discrimination was a substantial or motivating factor for the City’s actions.”<sup>157</sup>

4. *Early FHA Cases.*—Court decisions extending back to the earliest years of the FHA have considered whether the discriminatory denial of municipal services is actionable under this statute. In 1970, the Second Circuit in *Kennedy Park Homes Ass’n v. City of Lackawanna*<sup>158</sup> ruled that the defendants violated the Equal Protection Clause and the FHA based on their intentional discrimination in blocking a minority housing project planned for a white neighborhood.<sup>159</sup> Lackawanna had initially blocked the project by rezoning the proposed site as a park and by declaring a moratorium on new developments.<sup>160</sup> After suit was filed, the defendants rescinded these actions, but continued to stymie the project by refusing it permission to tie into the City’s sewer system.<sup>161</sup> The case, therefore, had elements of both exclusionary zoning and discriminatory municipal services. In affirming the district court’s judgment for the plaintiffs in *Kennedy Park*, the Second Circuit did not distinguish between their equal protection and FHA claims, but simply endorsed the trial court’s view that the City’s overall behavior toward the proposed project manifested illegal racial discrimination.<sup>162</sup>

Four years later, the Fifth Circuit reached a similar conclusion in *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*,<sup>163</sup> where

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154. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (recognizing that Title VI creates individual rights justifying an implied cause of action); *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) (stating that “private individuals may sue to enforce . . . Title VI”).

155. See *Alexander*, 532 U.S. at 280-93.

156. See 42 U.S.C. § 2000d, d-4a (2000); see, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555, 557 (1984).

157. *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*2 (N.D. Tex. Feb. 14, 2002) (citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001)). In *Miller*, the court dismissed the plaintiffs’ Title VI claim based on lack of evidence of defendant’s racially discriminatory motive in the City’s use of CDBG funds, *id.* at \*11, while upholding other theories requiring discriminatory intent. 2002 WL 230834. For a recent decision upholding a Title VI claim based on discriminatory municipal services, see *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492-98 (S.D. Ohio 2007); cf. *Ross v. Midland Management Co.*, 2003 WL 21801023, at \*3-4 (N.D. Ill. Aug. 1, 2003) (upholding tenant’s Title VI claim of discriminatory services).

158. 436 F.2d 108 (2d Cir. 1970), *aff’g* 318 F. Supp. 669 (W.D.N.Y. 1970).

159. *Id.* at 109-10.

160. *Id.* at 109.

161. *Id.* at 111.

162. *Id.* at 112-15.

163. 493 F.2d 799 (5th Cir. 1974).

the court's opinion took note of, but did not rely on, §§ 3604(a) and 3604(b) of the FHA in holding that the defendant's refusal to extend water and sewer service to a subsidized, heavily minority housing project violated the Equal Protection Clause.<sup>164</sup> The next appellate court to weigh in was the Fourth Circuit in 1984 in *Mackey v. Nationwide Insurance Cos.*,<sup>165</sup> which opined in dicta that § 3604(b)'s prohibition against discriminatory housing services "encompasses such things as garbage collection and other services of the kind usually provided by municipalities."<sup>166</sup> At least one court disagreed, however; in 1978, a Pennsylvania district judge in *Vercher v. Harrisburg Housing Authority*<sup>167</sup> rejected the view that § 3604(b) outlaws inferior police protection for black-occupied housing, concluding that to say "that every discriminatory municipal policy is prohibited by the Fair Housing Act would be to expand that Act to a civil rights statute of general applicability rather than one dealing with the specific problems of fair housing opportunities."<sup>168</sup>

The first appellate case to provide a focused analysis of FHA coverage of discriminatory municipal services was *Southend Neighborhood Improvement v. County of St. Clair*,<sup>169</sup> which was decided by the Seventh Circuit in 1984. The plaintiffs in *Southend* were homeowners in a poor, black neighborhood who alleged that the value of their homes was being diminished by the County's poor maintenance of its tax delinquent properties in the plaintiffs' neighborhood.<sup>170</sup> They asserted claims under §§ 3604(a), 3604(b), and 3617 of the FHA, the 1866

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164. *Id.* at 801-02, 802 n.4, 811 n.12.

165. 724 F.2d 419 (4th Cir. 1984).

166. *Id.* at 424. *Mackey* held that the FHA did not outlaw home insurance discrimination, specifically that such discrimination did not make housing "unavailable" in violation of § 3604(a), *id.* at 423, nor could home insurance "reasonably be described as the provision of a service in connection with dwellings" under § 3604(b). *Id.* at 424. This holding was later rejected by a number of courts, in part based on a subsequent HUD regulation interpreting the FHA to cover home insurance. See 24 C.F.R. § 100.70(d)(4) (2007) (providing that the FHA outlaws "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race [or other prohibited grounds]"); SCHWEMM, *supra* note 13, § 13:15 nn.16, 25 & 32 (citing pertinent cases).

167. 454 F. Supp. 423 (M.D. Pa. 1978).

168. *Id.* at 424. *Vercher* was a § 3617 action by a former employee of the defendant housing authority who claimed he had been fired for pursing the complaints of black tenants that they received less protection by city police than did white-occupied housing. *Id.* The court noted that this § 3617 claim could succeed if the FHA's substantive provisions covered such discrimination, but it held that § 3604(b) could not be extended to include police protection: "Police protection is not housing. Nor does it have any direct connection to the sale, rental, or occupancy of housing. Certainly the amount of police protection citizens receive has some impact on their use and enjoyment of their homes; but the same could be said of any municipal service." *Id.* While the plaintiff's FHA claim thus failed, the court went on to hold that his situation could be remedied with a claim under 42 U.S.C. § 1983. *Id.* at 425.

169. 743 F.2d 1207 (7th Cir. 1984).

170. *Id.* at 1208.

Civil Rights Act, and the Thirteenth and Fourteenth Amendments, all of which were rejected by the Seventh Circuit.<sup>171</sup> With respect to § 3604(a), the *Southend* opinion noted that this provision by its terms focuses on practices that “affect[] the availability of housing” and “is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons.”<sup>172</sup> Thus, according to the Seventh Circuit, § 3604(a) “does not protect the intangible interests in the already-owned property” alleged by the plaintiffs.<sup>173</sup> As to the § 3604(b) claim of discriminatory services, *Southend* reasoned that “[t]hat subsection applies to services generally provided by governmental units such as police and fire protection or garbage collection” and that “the County decisions regarding how to administer properties it holds by tax deed are distinct from these types of services.”<sup>174</sup> The Seventh Circuit ended its FHA analysis by concluding that “[t]he Act was not designed to address the concerns raised by the complaint.”<sup>175</sup>

The *Southend* opinion proved to be influential with respect to both §§

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171. *Id.* at 1210, 1210 n.4, 1212-13. After disposing of the FHA claims in *Southend*, the Seventh Circuit rejected the 1866 Act claims on the ground that “[t]he relationship between the County’s conduct and the alleged injuries to the plaintiffs’ neighboring properties is too tenuous to support a claim that the plaintiffs’ contract or property rights under [§§] 1981 and 1982 were infringed.” *Id.* at 1211. Furthermore, *Southend* viewed the plaintiffs’ injuries as not significant enough under *City of Memphis v. Greene*, 451 U.S. 100 (1981), *see supra* notes 134-48 and accompanying text, to give rise to a violation of the 1866 Act. 743 F.2d at 1212. “Here, the . . . plaintiffs’ ability to make contracts and manage their properties as protected under [§§] 1981 and 1982 could not have been affected in a significant manner by a County decision not to board up or demolish a building.” *Id.*

The *Southend* opinion did imply that the plaintiffs’ § 1982 claim might have been upheld if they had alleged that the County’s neglect “affirmatively altered the character of their communities in a manner that worsened their perceived plight” and thereby “constituted discriminatory damage to their contract and property rights.” *Id.* The Seventh Circuit also implied that a § 1982 claim would be appropriate if the County “refused discriminatorily to extend available services to blacks.” *Id.*

The *Southend* plaintiffs’ constitutional claims were dismissed on essentially the same ground that doomed their 1866 Act claims—that is, that “[t]he County’s conduct could have had at most minimal impact” on the plaintiffs’ neighborhood. *Id.* at 1213.

172. 743 F.2d at 1210.

173. *Id.*

174. *Id.* (citing *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423-24 (4th Cir. 1984)). *Mackey* held that home insurance discrimination did not violate either §§ 3604(a) or 3604(b), *see supra* note 166, but it did opine in dicta that the latter provision outlaws some discriminatory municipal services. 724 F.2d at 423-24. As the text indicates, *Mackey*’s technique of holding against the particular § 3604(b) claim presented, while commenting in dicta that this provision does cover common municipal services, was followed by the Seventh Circuit in its *Southend* opinion. 743 F.2d at 1210.

175. *Southend*, 743 F.2d at 1210. The plaintiffs’ § 3617 claim was rejected on the ground that, given the failure of their other FHA claims, the County’s conduct could not be said to constitute “interference with Fair Housing Act rights.” *Id.* at 1210 n.4.

3604(a) and 3604(b). As to § 3604(a), a number of pre-*Southend* decisions had opined that this provision's "otherwise make unavailable or deny" prohibition was "as broad as Congress could have made it."<sup>176</sup> *Southend* obviously disagreed, and the limitation it noted concerning this phrase's focus on making housing "unavailable" has been followed in many subsequent cases rejecting § 3604(a) claims,<sup>177</sup> including some brought by minority homeowners alleging discriminatory municipal services.<sup>178</sup>

In contrast, *Southend*'s treatment of § 3604(b) had a broadening effect. Although the Seventh Circuit ruled against the particular § 3604(b) claim there, the court's dicta that this provision "applies to services generally provided by governmental units such as police and fire protection or garbage collection",<sup>179</sup> became the foundation for numerous subsequent decisions that recognized § 3604(b) as covering discriminatory municipal services.<sup>180</sup>

### B. Modern FHA Law

1. *The 1988 Fair Housing Amendments Act.*—In 1988, after nearly a decade of consideration, Congress passed a major set of amendments to the FHA, known as the Fair Housing Amendments Act ("FHAA").<sup>181</sup> Among other things, the FHAA outlawed familial status and handicap (disability) discrimination, broadened the FHA's prohibition against financial discrimination in § 3605, strengthened the FHA's enforcement system, brought § 3617 claims under this enforcement system, and directed HUD to issue regulations interpreting the amended FHA.<sup>182</sup>

The latter provision soon resulted in a detailed set of FHA regulations, whose relevance to this Article is explored in the next section. The FHAA's new enforcement procedures are not directly relevant here, although they do reflect the 1988 Congress's awareness of and frustration with the failure of the 1968 FHA to more effectively reduce housing discrimination against racial and ethnic minorities.<sup>183</sup> The other three changes made by the FHAA are also not directly

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176. See SCHWEMM, *supra* note 13, § 13:4 n.2 and accompanying text (citing relevant cases).

177. See *id.* § 13:4 n.5 (citing relevant cases).

178. See *infra* cases cited in note 231.

179. *Southend*, 743 F.2d at 1210.

180. See *infra* cases cited in note 234; see also *McCauley v. City of Jacksonville*, No. 86-1674, 1987 WL 44775, at \*2 (4th Cir. Sept. 8, 1987) (unpublished decision) (upholding § 3604(b) claim by developer of low-income, integrated housing based on allegation that City denied sewer service to his proposed development because of race).

181. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619. The FHAA's legislative history is described in SCHWEMM, *supra* note 13, § 5:4.

182. See SCHWEMM, *supra* note 13, § 5:3.

183. Aware of HUD estimates that "2 million instances of housing discrimination [were continuing to] occur each year," the Congress that passed the FHAA saw the 1968 FHA as having been "ineffective because it lacks an effective enforcement mechanism." H.R. REP. NO. 100-711, at 15-16 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2176-77. Thus, the FHAA was intended

relevant to the FHA's coverage of municipal services discrimination against minorities, but each lends itself to an argument as to how the relevant provisions of the original FHA should be construed.

First, the FHAA substantially broadened the FHA's prohibition in § 3605 of discrimination in home mortgages and other "real estate related transactions."<sup>184</sup> The practices covered by this new § 3605 explicitly include making loans for "improving, repairing, or maintaining" dwellings, as well as those for "purchasing or constructing" housing.<sup>185</sup> This clearly indicates, contrary to Judge Posner's opinion in *Halprin*,<sup>186</sup> that the post-1988 FHA *does* extend its protections to current residents as well as homeseekers. While this does not directly challenge the *Halprin-Cox* determination to limit § 3604 to homeseekers, it does undercut their view that the FHA is generally unconcerned with discrimination against residents who have already acquired their homes.<sup>187</sup>

As for outlawing discrimination against families with children, the technique by which the FHAA barred this type of discrimination was simply to add "familial status" to the list of prohibited bases of discrimination in each of the FHA's substantive prohibitions, including § 3604.<sup>188</sup> Otherwise, Congress left the language of all of § 3604's subsections—including that of §§ 3604(a) and 3604(b)—precisely the same. The fact that the FHAA did make some changes in the FHA's substantive provisions (i.e., in § 3605) and that it "opened up" § 3604 by amending this section to include familial status discrimination suggests that Congress approved of the existing understanding of §§ 3604(a) and 3604(b).<sup>189</sup> Therefore, to the extent that judicial interpretations of §§ 3604(a) and

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to provide the FHA with "an effective enforcement system" in order to make the FHA's promise of nondiscrimination "a reality." *Id.* at 13. The FHAA strengthened all three of the FHA's enforcement techniques by: (1) eliminating the punitive damage cap, lengthening the statute of limitations, and making attorney's fees awards easier to obtain in private litigation; (2) establishing an expedited administrative complaint procedure that could result in injunctive relief, damages, and civil penalties; and (3) authorizing the Justice Department to collect monetary damages for aggrieved persons in its "pattern or practice" and "general public importance" cases. *See* 42 U.S.C. §§ 3610-3614 (2000); *see generally* SCHWEMM, *supra* note 13, ch. 24-26.

184. *See* 42 U.S.C. § 3605 (2000). For a description of the differences between the original § 3605 and the FHAA version, see SCHWEMM, *supra* note 13, § 18:1.

185. *See* 42 U.S.C. § 3605(b)(1)(A).

186. *See supra* notes 66-71 and accompanying text.

187. For other examples of FHA provisions that demonstrate a concern for protecting current residents, see Short, *supra* note 81, at 213-14, 217-21 (discussing the FHA's § 3604(b) (defining "dwelling" to include structures that are "occupied" as residences)), and 42 U.S.C. § 3617 (outlawing interference on account of one's "having exercised" a §§ 3604-3606 right); *infra* text accompanying notes 194-95 (discussing the FHA's § 3604(f)(1)(B) and § 3604(f)(2)(B), both of which outlaw discrimination because a person with a disability is "residing in" a dwelling); *see also* 42 U.S.C. § 3631 (provision, passed along with the FHA, making it a crime to use force because a person has "occupied" a dwelling)).

188. *See* 42 U.S.C. §§ 3604(a)-(e), 3605, 3606, 3617.

189. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware

3604(b) (e.g., the Seventh Circuit's opinion in *Southend*)<sup>190</sup> had delineated how these provisions applied to claims of discriminatory municipal services, the FHAA may be taken to have tacitly approved those interpretations.

The FHAA's prohibition against disability discrimination was handled somewhat differently. With respect to most of the FHA's substantive prohibitions, "handicap," like "familial status," was simply added to the list of FHA-prohibited bases of discrimination,<sup>191</sup> but this was not done in §§ 3604(a) and 3604(b). As to the practices outlawed by these provisions, they were copied almost verbatim in two new parts of the FHA—§§ 3604(f)(1) and 3604(f)(2)—that dealt exclusively with handicap discrimination.<sup>192</sup>

This was apparently done to make clear that the FHAA would not condemn housing made available especially for people with disabilities (i.e., that the statute does not authorize "reverse discrimination" suits against such housing by non-handicapped persons).<sup>193</sup> Thus, §§ 3604(f)(1) and 3604(f)(2) only make their identified practices unlawful if done "because of a handicap of—

- (A) that buyer or renter,
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or
- (C) any person associated with that buyer or renter."<sup>194</sup>

Among other things, the "residing in" language in part (B) of § 3604(f)(1) and § 3604(f)(2) shows that these provisions cover current residents as well as homeseekers.<sup>195</sup>

Two additional points are worth noting about § 3604(f)(2), the disability counterpart to § 3604(b)'s prohibition of discriminatory terms, conditions,

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of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)); *see also Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117 (2002) (finding "tacit congressional approval" of an interpretation of Title VII based on Congress's "being presumed to have known of [the] settled judicial treatment" of that statute when it made other amendments to that law); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) (holding it appropriate to assume that Congress knew of lower court decisions interpreting a statute and presuming that Congress intended to carry this interpretation forward in a similarly worded statute).

190. *See supra* note 174 and accompanying text; *supra* note 180.

191. *See* 42 U.S.C. §§ 3604(c)-(e), 3605, 3606, 3617.

192. *See id.* § 3604(f)(1)-(2).

193. *See, e.g.*, H.R. REP. NO. 100-711, at 24-25 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2185-86 (describing § 3604(f)(1) and § 3604(f)(2) as prohibiting discrimination "against" handicapped persons); Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3246 (Jan. 23, 1989) (noting in HUD's commentary on its FHAA regulations that the statute "does not prohibit the exclusion of non-handicapped persons from dwellings").

194. 42 U.S.C. § 3604(f)(1). The quoted language is from § 3604(f)(1); identical language is used in § 3604(f)(2), except that the latter substitutes "that person" for "that buyer or renter" in subparts (A) and (C).

195. *See* Short, *supra* note 81, at 216-17; *see also infra* note 201 and accompanying text and *infra* note 204 para. 2.

privileges, services, and facilities. First, the principal congressional report on § 3604(f)(2) gives some examples of the conduct it outlaws. This report states that § 3604(f)(2)

would guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of the premises, benefits and privileges made available to other tenants, residents, and owners. To the extent that terms, conditions, privileges, services or facilities operate to discriminate against a person because of a handicap, elimination of the discrimination would be required in order to comply with the requirements of this subsection.<sup>196</sup>

The examples in this commentary may help give meaning to the terms “facilities,” “privileges,” and “services” in § 3604(b) and § 3604(f)(2), and they also provide additional evidence that § 3604(f)(2) was intended to protect current residents as well as homeseekers.

However, before we can extend this understanding to the similar provision for other protected classes in § 3604(b), a second point about § 3604(f)(2) must be noted. The prohibitory language used in § 3604(f)(2) is nearly identical to that of § 3604(b), but the small difference may be important to the issue of whether current residents are covered by § 3604(b).<sup>197</sup> The first phrase of § 3604(f)(2) and § 3604(b) are the same, outlawing discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling.”<sup>198</sup> However, the second phrase in § 3604(f)(2) extends this prohibition to “services or facilities in connection with *such dwelling*,”<sup>199</sup> whereas this second phrase in § 3604(b) reads “services or facilities in connection *therewith*.<sup>200</sup> The “in connection with such dwelling” language in § 3604(f)(2) clearly affirms that this provision protects current residents as well as homeseekers, and post-FHAA decisions have so held.<sup>201</sup> However, the use of “therewith” in § 3604(b) has been interpreted by

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196. H.R. REP. NO. 100-711, at 23-24.

197. The prohibitory language used in § 3604(f)(1) is also not quite identical to that of its counterpart, § 3604(a), *see supra* note 48, and SCHWEMM, *supra* note 13, § 13:1, text accompanying nn.1-3, although the slight differences between these provisions do not seem relevant to the issue of whether they cover claims by current residents.

198. 42 U.S.C. §§ 3604(b), (f)(2) (2000).

199. *Id.* § 3604(f)(2) (emphasis added).

200. *See id.* § 3604(b) (emphasis added).

201. *See, e.g.*, Neudecker v. Boisclair Corp., 351 F.3d 361, 363-65 (8th Cir. 2003) (upholding § 3604(f)(2) claim by disabled tenant against his landlord based on disability harassment during plaintiff’s residency); Wilstein v. San Tropai Condo. Master Ass’n, No. 98 C 6211, 1999 WL 262145, at \*7 (N.D. Ill. Apr. 22, 1999) (upholding § 3604(f)(2) claim by disabled owner of condominium against his condominium association); Project Life, Inc. v. Glendening, No. WMN-98-2163, 1998 WL 1119864, at \*2 (D. Md. Nov. 30, 1998) (upholding § 3604(f)(2) claim challenging discrimination by governmental officials in providing parking and utility services); *see also* Cnty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 176 (3d Cir. 2005) (noting, in

some courts to revert back to the “sale or rental” language in the first phrase as opposed to that phrase’s “of a dwelling” language, thus leading them to agree with *Halprin* that § 3604(b) is limited to the “sale or rental” stage and does not protect current residents.<sup>202</sup>

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group home’s challenge to municipality’s decision concerning plaintiff’s sewer rates based on § 3604(f)(2), that “[b]y its express terms, this section applies to ‘the provision of services or facilities’ to a dwelling, such as sewer service”); *Good Shepherd Manor Found. v. City of Momence*, 323 F.3d 557, 565 (7th Cir. 2003) (suggesting in dicta that City’s cut-off of water supply to group home for disabled persons would violate the FHA if it were motivated by discriminatory intent); *Congdon v. Strine*, 854 F. Supp. 355, 360-62 (E.D. Pa. 1994) (rejecting for lack of proof tenants’ claim under § 3604(f)(2) that landlord discriminated against them by poorly maintaining the building’s elevator).

This conclusion reflects the fact that the Congress that passed the 1988 FHAA was aware of post-acquisition housing problems faced by disabled tenants. *See, e.g., Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong. 240 (1988) (statement of Homer C. Floyd, Executive Director, Pennsylvania Human Relations Commission) (noting that “[o]nce housed, the handicapped may face additional problems” and providing examples of difficulties encountered by disabled tenants).

As indicated by the Seventh Circuit’s comment in the *City of Momence* case *supra*, § 3604(f)(2) of the FHA would appear to provide current residents with a basis for challenging inferior municipal services based on disability discrimination. 323 F.3d at 565. In any event, such discrimination also seems to be outlawed by Title II of the 1990 Americans with Disabilities Act and, if the defendant receives federal financial assistance, by Section 504 of the 1973 Rehabilitation Act. *See, e.g., Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-46 (2d Cir. 1997).

202. *See Cox v. City of Dallas*, No. Civ.A. 3:98-CV-1763BH, 2004 WL 370242, at \*7-8 (N.D. Tex. Feb. 24, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005) (opining, in § 3604(b) claim alleging discriminatory municipal services, that in order to determine whether this provision “extends beyond the sale or rental of housing, it is necessary to decide whether the language ‘in connection with’[sic] refers to the ‘sale or rental of a dwelling’ or merely the ‘dwelling’ in general” and adopting the former interpretation in deciding against plaintiffs’ claim (citing *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989)); *King v. Metcalf 56 Homes Ass’n*, No. 04-2192-JWL, 2004 WL 2538379, at \*2 (D. Kan. Nov. 8, 2004) (rejecting black resident’s § 3604(b) claim against her condominium association for discriminatory treatment on the ground that this provision’s “in connection therewith” phrase plainly limits § 3604(b)’s scope “to discrimination in connection with the sale or rental of housing”); *Ross v. Midland Mgmt. Co.*, No. 02 C 8190, 2003 WL 21801023, at \*4 (N.D. Ill. Aug. 1, 2003) (rejecting black resident’s § 3604(b) claim against her landlord for discriminatory services on the ground that this provision’s “in connection therewith” phrase limits § 3604(b)’s scope to “services in connection with the acquisition of housing, not its maintenance” (citing *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 717, 719-20 (D.C. Cir. 1991)); *Laramore*, 722 F. Supp. at 452 (rejecting black plaintiffs’ § 3604(b) claim challenging governmental agency’s decision to locate sports facility in their neighborhood in part on the ground that this provision’s “in connection with” phrase is more naturally read to refer to “sale or rental” than to “a dwelling”).

Other courts, however, have disagreed. *See, e.g., Edwards v. Johnston County Health Dep’t*,

Can this tiny difference between § 3604(f)(2) and § 3604(b) bear such weight? It seems unlikely, given the total absence in the FHAA's legislative history of any mention of this difference, much less any comment on its potential significance. Furthermore, both the courts and HUD have opined that § 3604(b)'s outlawed practices are identical to those banned by § 3604(f)(2).<sup>203</sup> But the difference is there, and it presumably means something.<sup>204</sup>

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885 F.2d 1215, 1224 (4th Cir. 1989) (assuming that § 3604(b)'s second phrase bans discrimination "in the provision of services 'in connection with a dwelling'"); *Thompson v. HUD*, 348 F. Supp. 2d 398, 416 (D. Md. 2005) (same); *see also* *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 453 (E.D. Pa. 2006) (noting that "the statute is somewhat vague on the question of what 'the provision of services or facilities' modifies"); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*2-5 n.16 (M.D. Fla. May 2, 2005) (described *infra* note 342); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004) (viewing HUD's regulation in 24 C.F.R. § 100.65(a) as interpreting "the 'in connection therewith' language of § 3604(b) as referring to the 'sale or rental of a dwelling,' rather than the 'dwelling' in general," but nevertheless upholding § 3604(b) claim alleging discriminatory municipal services based, in part, on interpreting that provision's "therewith" phase to cover services "associated with a dwelling" based on this HUD regulation).

203. HUD's view is described *infra* note 228 and accompanying text. Court opinions include *Smith v. Pacific Properties & Development Corp.*, 358 F.3d 1097, 1103 (9th Cir. 2004) ("statutory language of § 3604(f)(2) . . . replicates that of § 3604(b)"); *Clifton Terrace*, 929 F.2d at 719 (§ 3604(f)(2) "extends the same protection to the handicapped" as § 3604(b) does to other protected classes); *United States v. Koch*, 352 F. Supp. 2d 970, 971-76 (D. Neb. 2004) (relying on § 3604(f)(2) precedent to hold that § 3604(b) applies to current residents).

Even Judge Posner's opinion in *Halprin* did not make a distinction between § 3604(b) and § 3604(f)(2). *See Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004) (citing *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003) (a § 3604(f)(2) case); *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) and *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993) (§ 3604(b) cases involving sexual harassment of tenants)) as among those decisions that had recognized § 3604 claims by current residents, but dismissing all of these decisions as not containing "a *considered* holding").

204. *See, e.g.*, *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) (in determining "whether Congress intended its different words to make a legal difference[, w]e normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

One possible explanation for why Congress felt the need to make § 3604(f)(2) explicit in covering services and facilities connected to dwellings (as opposed to those connected only with sales and rentals of dwellings) is that this provision—along with § 3604(f)(1)—is the target of § 3604(f)(3), which defines certain practices as "discrimination" for purposes of these earlier subsections. Two of the practices identified in § 3604(f)(3)—required modifications in § 3604(f)(3)(A) and required accommodations in § 3604(f)(3)(B)—are primarily directed against landlords and other housing providers who are dealing with current residents. *See, e.g.*, *Wilstein*, 1999 WL 262145, at \*7-8 (upholding § 3604(f)(3) reasonable accommodation claim under § 3604(f)(2) by disabled owner of condominium against his condominium association); 24 C.F.R.

2. *The 1989 HUD Regulations*.—As mandated by the 1988 FHAA,<sup>205</sup> HUD promptly published a lengthy set of FHA regulations that became effective on March 12, 1989.<sup>206</sup> These regulations are accorded *Chevron* deference.<sup>207</sup> This means that, unless “Congress has directly spoken to the precise question at issue” (i.e., the statute “unambiguously expressed the intent of Congress”),<sup>208</sup> courts are to follow the HUD regulations so long as they are a “permissible” or “reasonable” construction of the FHA (i.e., they “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”).<sup>209</sup> HUD’s FHA regulations deal explicitly with § 3604’s coverage of discriminatory municipal services and also provide additional indications that § 3604(b) applies to current residents.

The regulations interpreting § 3604 are set forth in 24 C.F.R. §§ 100.50–.85, with § 100.50 providing an overview;<sup>210</sup> § 100.60 providing examples of conduct prohibited by § 3604(a);<sup>211</sup> § 100.65 providing examples of § 3604(b)-prohibited conduct;<sup>212</sup> § 100.70 providing examples of “other prohibited sales and rental conduct”;<sup>213</sup> and succeeding provisions providing examples of conduct prohibited by other subsections of § 3604.<sup>214</sup> These regulations, like § 3604 itself, simply describe the conduct prohibited, without identifying who might be appropriate defendants, thereby implying that any person or entity who engages in such FHA-prohibited conduct may be held liable.<sup>215</sup>

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§ 100.203(c) ex. 1 (2007) (illustrating a violation of § 3604(f)(3)(A)’s reasonable modifications requirement with an example involving a current tenant’s request to his landlord). The idea suggested here is that, as the substantive prohibition that is target of these requirements, § 3604(f)(1)-(2) must be especially carefully written to make clear it covers current residents. *See generally Burlington Northern*, 548 U.S. at 63-67 (relying on the purpose of provisions involved in determining whether Congress’s use of different language in these provisions should make a legal difference).

205. *See* 42 U.S.C. § 3614a (2000).

206. Implementation of the Fair Housing Amendments of 1988, 54 Fed. Reg. 3232 (Jan. 23, 1989).

207. *See Chevron*, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984); *see also* Meyer v. Holley, 537 U.S. 280, 287-88 (2003) (relying on HUD regulation to interpret the FHA). For a list of decisions that have accorded deference to HUD’s FHA regulations, see SCHWEMM, *supra* note 13, § 7:5 n.17.

208. *Chevron*, 467 U.S. at 842-43.

209. *Id.* at 843-45.

210. *See* 24 C.F.R. § 100.50 (2007).

211. *See id.* § 100.60.

212. *See id.* § 100.65.

213. *See id.* § 100.70.

214. *See id.* § 100.75 (dealing with § 3604(c)); § 100.80 (dealing with § 3604(d)); and § 100.85 (dealing with § 3604(e)).

215. *See* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992) (noting that § 3604 is written “in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence”); *see also* Meyer v. Holley, 537 U.S. 280,

In light of *Southend* and the few other cases that had dealt with municipal services prior to these regulations,<sup>216</sup> one might have expected this matter to be dealt with in § 100.65, the regulation specifically dealing with § 3604(b). Indeed, this regulation does include an example of prohibited conduct by providers of housing-related services that seems potentially applicable to municipalities: “Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>217</sup> According to HUD’s commentary, this and the other examples indicate that “the coverage of [§ 3604(b)] extends beyond restrictions or differences in a lease or sales contract [to outlaw discriminatory] denials of, or limitations on the use of privileges, services or facilities, relating to the sale or rental of a dwelling.”<sup>218</sup>

However, the explicit reference to municipal services in the regulations does not appear in § 100.65, but in § 100.70, which deals with “other prohibited sales and rental conduct.” Specifically, § 100.70(d)(4) identifies as a prohibited activity: “Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>219</sup>

This provision appears as the last of four examples of “[p]rohibited activities

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285-86 (noting that the FHA “focuses on prohibited acts” and “says nothing about [defendants’] vicarious liability”).

216. See *supra* notes 168, 174 and accompanying text (discussing, respectively, *Vercher*, *Mackey*, and *Southend*); see also *infra* notes 337-39 and accompanying text (discussing Justice Harlan’s dissent in *Sullivan*).

217. 24 C.F.R. § 100.65(b)(4). For a pre-Cox decision interpreting this regulation to apply to discriminatory municipal services, see *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004).

Another possibly relevant example of prohibited conduct in HUD’s § 3604(b) regulation is: “Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.65(b)(2). “Maintenance or repairs” here could conceivably cover, for example, a municipality’s program of road improvements, but the HUD example is limited to maintenance and repairs that are “of sale or rental dwellings,” implying that the example is directed only against housing providers. This latter phrase is also odd in that it suggests exclusion of some “dwellings” (i.e., those not encompassed by the phrase “sale or rental dwellings”). *See id.* In short, there are sufficient ambiguities in this latter example to conclude that it may not be particularly useful to support claims of discriminatory municipal services by current residents.

218. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3239 (Jan. 23, 1989).

219. 24 C.F.R. § 100.70(d)(4). For cases referring to this regulation’s coverage of municipal services discrimination, see *supra* note 50 and *infra* note 224. Cases according *Chevron* deference to this regulation’s coverage of insurance discrimination include *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351, 1356-60 (6th Cir. 1995); *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 300-01 (7th Cir. 1992); *Strange v. Nationwide Mutual Insurance Co.*, 867 F. Supp. 1209, 1214 (E.D. Pa. 1994).

relating to dwellings under paragraph (b) of this section,” which outlaws any discriminatory conduct “relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons.”<sup>220</sup> In other words, the regulation that outlaws discriminatory municipal services does so as an example of a more general prohibitive regulation whose language combines the “services and facilities” wording of § 3604(b) with the “otherwise make unavailable or deny” phrase in § 3604(a).

By so placing the prohibition against discriminatory municipal services, HUD has indicated that this practice might violate § 3604(a) as well as § 3604(b). HUD’s commentary on this regulation notes how discriminatory municipal services might violate § 3604(a)’s “make unavailable” provision—that is, that “discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including discriminatory refusals to provide municipal services . . . render dwellings unavailable” in violation of the Fair Housing Act.<sup>221</sup> Thus, for example, in cases like *Kennedy Park* and *United Farm Workers* where municipalities blocked proposed developments by denying them water or sewer service for racial reasons,<sup>222</sup> housing would be made unavailable in violation of § 3604(a).<sup>223</sup>

On the other hand, a claim based on a municipality’s provision of inferior services to homeowners in a minority neighborhood would presumably be more appropriate under § 3604(b), with a § 3604(a) claim arising in this situation only if the discrimination became so egregious that the plaintiffs’ homes were made “unavailable.” In the former situation—the one presented in *Cox*—the HUD example’s language seems directly on point; that is, it identifies prohibited action as “providing such [municipal] services . . . differently because of race.”<sup>224</sup> However, the context of this example confuses the matter, because the example is given to illustrate the principle that such discriminatory action is outlawed if it relates “to the provision . . . of services . . . in connection [with housing] that

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220. 24 C.F.R. § 100.70(b).

221. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3240 (Jan. 23, 1989). Similarly, HUD’s earlier commentary on this regulation noted that “discrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including discriminatory refusals to provide municipal services . . . , has been interpreted by the Department and by courts to render dwellings unavailable under the ‘otherwise make unavailable’ [part of § 3604(a)] in the Fair Housing Act.” Fair Housing; Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44992, 44997 (Nov. 7, 1988).

222. *See supra* notes 158-64 and accompanying text.

223. For an example of a case decided after the 1989 HUD regulations took effect, see *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958-60 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App’x 560 (6th Cir. 2004) (described *infra* note 232).

224. *See supra* text accompanying note 219. For a pre-*Cox* decision relying on this regulation to uphold a § 3604(b) claim by homeowners in a minority neighborhood who alleged discrimination in various municipal services, see *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*7-9 (N.D. Tex. Sept. 9, 2004).

otherwise makes unavailable or denies dwellings to persons.”<sup>225</sup> In other words, providing discriminatory municipal services is an FHA violation, but perhaps only if it makes housing unavailable. If this is so, then HUD’s example dealing with discriminatory municipal service does not provide guidance with respect to a *Cox*-type case brought by current homeowners.<sup>226</sup>

One final comment about the HUD regulations and their relevance to the issues discussed in this Article is that these regulations reflect HUD’s view that the practices outlawed by § 3604(b) are identical to those banned by § 3604(f)(2). The latter, as we have seen, protects current residents as well as homeseekers.<sup>227</sup> HUD’s belief that § 3604(b)’s coverage is co-equal with § 3604(f)(2)’s is reflected in the fact that its regulation interpreting § 3604(b) also deals with the handicap prohibitions of § 3604(f)(2).<sup>228</sup> Indeed, HUD’s other regulations dealing with handicap-based discrimination do not address the coverage of § 3604(f)(2) at all, other than to paraphrase the text of this provision.<sup>229</sup> Further, evidence of HUD’s belief that § 3604(b) and § 3604(f)(2) outlaw identical practices appears in its commentary on the regulation dealing with these provisions, which states that, subject to reasonable health-and-safety rules, this regulation requires “full access of handicapped persons and children to all facilities provided in connection with dwellings;”<sup>230</sup> that is, the protection against “facilities” discrimination accorded families with children in § 3604(b) is the same as its counterpart for persons with disabilities in § 3604(f)(2).

3. *Post-Regulation Cases*.—Most FHA-based municipal services cases decided after HUD’s 1989 regulations took effect have been brought by current homeowners. Courts in these cases have generally not been receptive to § 3604(a)-“make unavailable” claims by such plaintiffs.<sup>231</sup> The decisions have thus

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225. *See supra* text accompanying note 220.

226. Despite this ambiguity, courts have relied on this regulation to hold that § 3604(b) bars home insurance discrimination in the context of claims brought by current, as well as would-be, homeowners. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1354, 1356-60 (6th Cir. 1995); *Franklin v. Allstate Corp.*, No. C-06-1909 MMC, 2007 WL 1991516, at \*1-2, \*6-7 (N.D. Cal. July 3, 2007).

227. *See supra* notes 197-201 and accompanying text.

228. *See* 24 C.F.R. § 100.65 (2007); *see also supra* note 217 and accompanying text (quoting examples of conduct prohibited by § 3604(b) in 24 C.F.R. § 100.65(b) as including those based on handicap as well as those based on the six protected classes covered by § 3604(b)).

229. *See* 24 C.F.R. § 100.200-.205. The paraphrasing of § 3604(f)(2) occurs in 24 C.F.R. § 100.202(b), which includes no examples of prohibited behavior, in contrast to the other parts of the handicap-based regulations, which often provide examples and deal in detail with, *inter alia*, prohibited inquiries of applicants, reasonable modifications and accommodations for disabled persons, and the FHAA’s design-and-construction requirements. *See* 24 C.F.R. § 100.202(c)-.205.

230. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989).

231. *See Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192-93 (4th Cir. 1999) (dismissing, based on *Southend* and other cases, black homeowners’ § 3604(a) claim challenging the siting of a new highway near their neighborhood on the ground that no one was

agreed with *Southend* that this provision is limited to situations where municipal action blocks the development of housing<sup>232</sup> or is so disruptive of current residents' habitability that their housing is effectively made unavailable to them.<sup>233</sup>

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evicted or denied housing by this decision, and it therefore did not make housing unavailable under § 3604(a)); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*2-3 (N.D. Tex. Sept. 9, 2004) (dismissing, based on *Southend*, black homeowners' § 3604(a) claim of discrimination in various municipal services); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 254 F. Supp. 2d 486, 500-02 (D.N.J. 2003) (dismissing, based on *Southend* and other cases, § 3604(a) claim by residents of minority neighborhood against governmental agency whose permitting of a nearby cement plant had only an indirect effect on availability of housing in plaintiffs' neighborhood); *Miller v. City of Dallas*, No. Civ.A. 3898-CV-2955-D, 2002 WL 230834, at \*12-13 (N.D. Tex. Feb. 14, 2002) (rejecting, based on *Southend*, black homeowners' § 3604(a) claim alleging discrimination in various municipal services); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143 (N.D. Ill. 1993) (rejecting, based on *Southend*, black homeowners' § 3604(a) claim that defendants terminated police protection of plaintiffs' home because of their race); *see also* *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 n.13 (3d Cir. 2002) (rejecting § 3604(a) claim by current residents based on municipality's removal of Jewish religious symbols from its utility poles on the ground that this action did not make housing "unavailable" to the plaintiffs and that, while it may have made "their living in the Borough less desirable," § 3604(a) could not be stretched "to encompass actions that both (1) do not actually make it more *difficult* (as opposed to less *desirable*) to obtain housing and (2) do not directly regulate or zone housing or activities within the home"); *Jackson v. Okaloosa County*, Fla., 21 F.3d 1531, 1542 (11th Cir. 1994) (noting, while upholding § 3604(a) claim here, that this provision requires plaintiffs to "allege unequal treatment on the basis of race that affects the availability of housing"); *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 719-20 (D.C. Cir. 1991) (rejecting, based on *Southend*, § 3604(a) claim of discriminatory services on behalf of black apartment residents on the ground that this provision—while perhaps extending to sewer hook-ups and certain other "essential services relating to a dwelling . . . [that] might result in the denial of housing"—cannot reach beyond issues of housing availability to those of habitability); *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1221-24 (4th Cir. 1989) (affirming dismissal of § 3604(a) claim that County inappropriately approved substandard housing for migrant farm workers in part on the ground that such approval did not make any housing "unavailable").

232. A modern example of such a case is *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 958-60 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004), which upheld FHA claims—citing §§ 3604(a), 3604(b), 3604(c), and 3617—by a black lot owner who alleged that municipal officials denied water service to his planned home because of his race. *See also* *McCauley v. City of Jacksonville*, No. 86-1674, 1987 WL 44775, at \*2 (4th Cir. Sept. 8, 1987) (described *supra* note 180).

233. *See, e.g.*, *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 684-85 (D.C. Cir. 2006) (rejecting defendant-municipality's argument that, absent its actual closing of Hispanics' apartment buildings, its posting of "closure" notices on those buildings was insufficient to violate tenants' § 3604(a) rights, because "[t]elling the tenants either that their 'occupancy . . . is . . . prohibited' or that they must 'seek alternative housing' certainly qualifies as making the buildings 'unavailable' under the FHA"); *cf. United Farm Bureau Family Mut. Ins. Co. v. Metro.*

On the other hand, the years following publication of the HUD regulations produced many decisions endorsing § 3604(b) claims by current residents.<sup>234</sup> This body of cases includes only a handful that cited the HUD regulation,<sup>235</sup> but

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Human Relations Comm'n, 24 F.3d 1008, 1014, 1014 n.8 (7th Cir. 1994) (upholding resident's claim that insurance company's refusal to renew his homeowner's policy on racial grounds violates the FHA's § 3604(a) and § 3604(b) along with similarly worded state and local fair housing provisions and determining that the goal of these laws is to eliminate "discrimination in the acquisition, and one must presume retention, of real property and housing" and that nonrenewal of a home insurance policy "undoubtedly could make owning and retaining real property unavailable"); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20-22 (D.D.C. 2000) (upholding resident's predatory lending claim based on § 3604(a) on the ground that "predatory practices . . . can make housing unavailable by putting borrowers at risk of losing the property which secures their loans").

234. See, e.g., *Lopez*, 2004 WL 2026804, at \*6-9 (denying summary judgment for defendants in § 3604(b) claim by homeowners in black neighborhood who alleged discrimination in various municipal services); *Middlebrook*, 341 F. Supp. 2d at 960 (upholding, based on the "clear language of § 3604(b) and § 3617," black property owner's FHA claim alleging that municipal officials denied water service to plaintiff's planned home because of his race); *Miller*, 2002 WL 230834, at \*14 (denying summary judgment for defendants in § 3604(b) claim alleging discrimination in various municipal services); *Campbell*, 815 F. Supp. at 1143-44 (upholding black homeowners' § 3604(b) claim of discrimination in the provision of police protection and, as a result, also their § 3617 claim); see also *2922 Sherman Ave. Tenants' Ass'n*, 444 F.3d at 682-85 (upholding claim based on both § 3604(a) and § 3604(b) alleging that municipality discriminated against Hispanic-occupied apartment buildings in its enforcement of housing code violations); *Franks v. Ross*, 313 F.3d 184, 191 (4th Cir. 2002) (citing § 3604(b) as the FHA's relevant provision in case brought by residents of black town claiming that County sited undesirable landfill near it based on race); *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 193 (rejecting the particular § 3604(b) claim presented, but noting that this provision does require "'such things as garbage collection and other services of the kind usually provided by municipalities'" (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (9th Cir. 1989))); *Clifton Terrace Assocs.*, 929 F.2d at 720 (suggesting, without deciding, that § 3604(b) covers utilities and other "sole source" providers of services essential to a dwelling's habitability who, although not themselves housing providers, "otherwise control the provision of housing services and facilities"); *Edwards*, 885 F.2d at 1224-25 (assuming that the defendant's inspection and permit system for approving housing for migrant farm workers would fall within the scope of § 3604(b), but dismissing claim because plaintiffs failed to allege that different services were being accorded housing for whites); *S. Camden*, 254 F. Supp. 2d at 499, 502-03 (rejecting the particular § 3604(b) claim presented, but noting that this provision would cover governmental units that provide "specific residential services [including those] responsible for door-to-door ministrations such as . . . police departments [and] fire departments"); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (rejecting the particular § 3604(b) claim presented, but noting that this provision may cover police and fire protection and garbage collection).

235. See, e.g., *Shaikh v. City of Chi.*, 341 F.3d 627, 631-32 & n.2 (7th Cir. 2003) (citing the HUD regulation in support of the proposition that withholding police or fire protection would be covered by the FHA); *Lopez*, 2004 WL 2026804, at \*7-9 (described *supra* note 202 ¶ 2); see also

they, along with this regulation, seemed to settle the basic issue of the FHA's coverage of discriminatory municipal services.<sup>236</sup>

Still, a number of cases decided after publication of the 1989 HUD regulations resisted the idea that § 3604(b) could be extended to all governmental activities that might have a negative impact on the use and enjoyment of housing. These included:

- a 1999 Fourth Circuit decision rejecting a § 3604(b) claim by black homeowners challenging the siting of a new highway near their neighborhood on the ground that the defendants' decision was not a "housing or housing related service" under this provision;<sup>237</sup>
- a 2003 district court decision rejecting a § 3604(b) claim by residents of a black neighborhood against a governmental environmental protection agency that permitted operation of a near-by cement plant on the ground that this defendant did not provide "a service . . . in a manner contemplated by the Fair Housing Act" as distinguished from governmental units "responsible for door-to-door ministrations such as those provided by police departments, fire departments, or other municipal units";<sup>238</sup> and,
- a 1989 district court decision rejecting a § 3604(b) claim by area residents challenging a governmental agency's decision to locate a sports stadium in their neighborhood on the ground that, while § 3604(b) might cover police and fire protection and garbage collection, it "cannot be extended to a decision such as the selection of a stadium site."<sup>239</sup>

In addition, dicta in a 1991 D.C. Circuit decision expressed skepticism about whether all discriminatory municipal services that "have an impact on the use and enjoyment of residential property rights" would be redressable under § 3604(b).<sup>240</sup>

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*Clifton Terrace Assocs.*, 929 F.2d at 719-20 (described *infra* note 240).

236. The one contrary decision seems to be *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012 (6th Cir. 1989), which affirmed dismissal of an FHA claim based on defendant's providing inferior police protection to a minority neighborhood. *Id.* at 1017. The opinion, however, upheld the plaintiffs' equal protection and Title VI claims and did not explicitly discuss the reason for rejecting the FHA claim. *Id.*

237. *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 193. The *Jersey Heights* opinion also commented that § 3604(b) does "not extend to every activity having any conceivable effect on neighborhood residents. . . . The Fair Housing Act does not grant to residents the right to have highways sited where they please. . . . We do not think the drafters of the Fair Housing Act ever contemplated such a reading." *Id.* at 193-94.

238. *S. Camden*, 254 F. Supp. 2d at 499, 502-03.

239. *Laramore*, 722 F. Supp. at 452.

240. *Clifton Terrace Assocs.*, 929 F.2d at 720 (rejecting § 3604(b) claim by apartment owner against elevator company that allegedly refused to repair the elevators in plaintiff's building

To summarize, in the fifteen years after the FHAA's enactment and the 1989 HUD regulations, three propositions seem to have become well established:

—First, the FHA through § 3604(a) provides a remedy for discriminatory municipal services, but only where such discrimination has the effect of making housing unavailable (e.g., where a municipality totally blocks development of new housing or renders current housing virtually uninhabitable);

—Second, § 3604(b) outlaws the discriminatory provision of basic, housing-related municipal services, such as police and fire protection and garbage collection; and,

—Third, determining whether certain other government acts qualify as "services" or negatively impact the "privileges" covered by § 3604(b) requires a case-by-case analysis, with the answer probably being "No" if the challenged act involves such one-time decisions as the siting of a highway, factory, or other residentially-disruptive use in or near the plaintiffs' neighborhood.

As we have seen, however, the appellate decisions of *Halprin* in 2004 and *Cox* in 2005 undercut the second of these well-established propositions by holding that current residents could not invoke § 3604.<sup>241</sup> This limited view of § 3604(b) was also espoused in a few district court opinions that preceded *Halprin*<sup>242</sup> and has been the subject of a split among district judges outside the Seventh and Fifth Circuits after *Halprin* and *Cox*.<sup>243</sup>

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because of the residents' race on the ground that § 3604(b) was intended to protect residents with discriminatory service claims *against* housing providers and could not generally be invoked by housing providers against third parties who offer services to them). The *Clifton Terrace* opinion, which also rejected the plaintiff's § 3604(a) claim, is further described *supra* notes 231 and 234 and *infra* text accompanying notes 355-65.

241. See *supra* Parts I.B (*Halprin*) and I.C (*Cox*).

242. See sources cited *supra* note 62.

243. Decisions adopting the *Halprin-Cox* position include *Steele v. City of Port Wentworth*, Civ. A. No. CV405-135, 2008 WL 717813 (S.D. Ga. Mar. 17, 2008) (described *infra* note 398); *Miller v. City of Knoxville*, No. 3:03-CV-574, 2006 WL 2506229, at \*2 (E.D. Tenn. Aug. 29, 2006) (stating "that the [FHA] does not apply to municipalities in failing to enforce codes, as such action goes to the habitability of a dwelling, not the availability" (citing *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005)); *see also* *Roy v. Bd. of County Comm'rs of Walton County, Florida*, No. 3:06cv95/MCR/EMT, 2007 WL 3345352, at \*12 (N.D. Fla. Nov. 9, 2007) (rejecting § 3604(b) claim based on County's denial of zoning approval for plaintiffs' proposed housing development in part because the delays and impediments imposed by the defendants "were not connected with the sale of the property to the plaintiffs and only affected their use of property previously purchased").

Decisions upholding § 3604(b) claims by homeowners and other current residents include *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 808-09 (W.D. Tenn. 2005); *United*

As indicated in the previous discussion of *Halprin*, the Seventh Circuit's opinion in that case is flawed,<sup>244</sup> but the validity of its basic conclusion denying § 3604 protection to current residents—and of the Fifth Circuit's decision in *Cox* to endorse this conclusion—turns mainly on the specific language used in subsections (a) and (b) of § 3604. We turn next to an examination of that language.

### III. KEY FHA PROVISIONS AND THEIR LEGISLATIVE HISTORY

#### A. Overview

The FHA's first section boldly declares that it "is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."<sup>245</sup> After two sections dealing with definitions, effective dates, and exemptions, the fourth section contains the FHA's main substantive prohibitions. As we have seen, the first two subsections of this provision—§ 3604(a) and § 3604(b)—have been the basis for most FHA claims of discriminatory municipal services.<sup>246</sup> Additional discriminatory practices are outlawed in the other subsections of § 3604 and in §§ 3605-3606.<sup>247</sup> Finally, § 3617, which is also occasionally relied on in discriminatory municipal services cases,<sup>248</sup> prohibits interference "with any person in the exercise or enjoyment of,

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*States v. Koch*, 352 F. Supp. 2d 970, 975-78 (D. Neb. 2004); *North Dakota Fair Housing Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 980-981 (D.N.D. 2004); *see also* *United States v. Matusoff Rental Co.*, 494 F. Supp. 2d 740, 745, 758 (S.D. Ohio 2007) (holding that the defendant violated § 3604(b) in part because it refused to perform needed maintenance on the apartment of a mixed-race couple); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 452-53 (E.D. Pa. 2006) (recognizing that § 3604(b) may cover police and fire protection, garbage collection, and similar municipal services, but rejecting the present claim based on defendant's denial of a zoning variance for plaintiff's property on the ground that this is instead "a discretionary decision comparable to administering city-owned properties or deciding where to site a highway, conduct that is not covered under § 3604(b)"); *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1228-31 (S.D. Fla. 2005) (described *infra* note 349).

244. *See supra* notes 79-89 and accompanying text.

245. 42 U.S.C. § 3601 (2000).

246. The texts of subsections (a) and (b) of § 3604 are set forth in *supra* notes 48 and 49 respectively.

247. *See* 42 U.S.C. § 3604(c) (outlawing discriminatory advertisements, notices, and statements); § 3604(d) (outlawing discriminatory misrepresentations of availability); § 3604(e) (outlawing "blockbusting"); § 3605 (outlawing discrimination in home financing and certain other real estate related transactions); and § 3606 (outlawing discrimination in brokerage services).

248. *See, e.g.*, *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 n.4 (7th Cir. 1984) (described *supra* note 175); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 960 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004) (described *supra* note 232); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (described *supra* note 234); *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D.

or on account of his having exercised or enjoyed . . . any right granted or protected by [§§ 3603-3606]."<sup>249</sup> The relevant substantive prohibitions in § 3604(a), § 3604(b), and § 3617 have remained the same since the FHA was enacted in 1968.<sup>250</sup>

The language used in these substantive provisions evolved as the FHA was being considered by Congress beginning in 1966. The rest of Part III describes this evolution, which provides some insight into the meaning of the phrases used and thus some perspective for answering the two questions at the heart of this Article: (1) May the prohibitions set forth in § 3604—and particularly in § 3604(b)—be invoked by current residents to challenge discrimination by local municipalities? and (2) Do the “services” and “privileges” mentioned in § 3604(b) cover municipal services? With respect to both questions, the FHA’s key language originated in the first fair housing bill proposed by President Johnson in 1966, although the context, and therefore the possible interpretation, of this language did change somewhat in subsequent versions of the bills that became the FHA.

### *B. Legislative History of § 3604(a) and § 3604(b)*

The legislative history of the 1968 FHA has been recounted a number of times,<sup>251</sup> and its key features should be familiar to this audience. The FHA was passed after the assassination of Dr. Martin Luther King, Jr. led to riots in Washington, D.C., and other cities, whose counterparts in 1966 and 1967 had prompted a presidential commission that called for a national open housing law.<sup>252</sup>

Due to the haste that characterized passage of the FHA in 1968, its legislative history produced little useful material concerning the proper interpretation of its substantive prohibitions. No committee report was ever issued on the bill that became the FHA, and the hearings that were held on prior proposals generally dealt with the overall need for a fair housing law to allow blacks to escape urban ghettos and with Congress’s power to enact such a law.<sup>253</sup> Even the 1968 floor debates, to the extent they dealt with coverage issues, focused mainly on the statute’s exemptions and who would be proper defendants, rather than on the meaning of the phrases used in § 3604(a), § 3604(b), and the other substantive

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Pa. 1978) (described *supra* note 168).

249. 42 U.S.C. § 3617.

250. See *infra* note 257 and accompanying text. Furthermore, all of these prohibitions are, and have been for many years, mirrored in scores of state and local fair housing laws. See *supra* note 28.

251. See, e.g., Jean Eberhart Dubofksy, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 197-206 (2001).

252. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 8-13 (1968).

253. See generally hearings cited *infra* notes 261 and 278.

prohibitions.<sup>254</sup> Thus, the proper interpretation of these provisions—even more so than with most legislation—must be derived almost exclusively from the words of the statute, unaided by legislative history.<sup>255</sup>

Five distinct versions of the bill that eventually became the FHA were considered by Congress, beginning with the Johnson Administration's initial proposal in early 1966.<sup>256</sup> In all five versions, the language of what became § 3604(a) and § 3604(b) remained virtually unchanged.<sup>257</sup> Thus, the key language

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254. For example, an analysis of Senator Dirksen's late proposal, *see infra* note 264 and accompanying text, that was prepared by the Justice Department and introduced on the Senate floor, simply paraphrased the bill's various prohibitions, including those that became § 3604(a) and § 3604(b), without providing any additional explanation of their specific meaning. *See* 114 CONG. REC. 4907 (1968). Similarly, when the Senate-passed version reached the House floor, Judiciary Committee Chairman Cellar offered a comparison of this bill to the 1966 House-passed version, *see infra* note 260 and accompanying text, that did not describe the substantive prohibitions other than to say that the House-passed version "prohibited almost the exact same type of conduct with respect to housing discrimination" as did the Senate bill. *See id.* at 9560-61. Later in the House floor debates, Republican Leader Gerald Ford introduced a memorandum prepared by the staff of the House Judiciary Committee that did point out a number of differences between these two versions, but none of these dealt with the prohibitions in § 3604(a) and § 3604(b), as to which the memorandum provided no description other than to say that they were the equivalent of the House-passed version's § 403(a)(1) and § 403(a)(2). *See id.* at 9611-13. Thus, for example, Professor Oliveri has determined: "There [is] no discussion anywhere in [the FHA's] legislative history about how to interpret the language of § 3604(b). . . . [There is] [n]o specific discussion [about] whether . . . the FHA [should be construed to apply] to post-acquisition housing." Oliveri, *supra* note 82, at 27.

255. *See, e.g.*, Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (relying on the "plain language" to interpret a Title VII provision and remarking that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'" (citations omitted)).

256. The Johnson Administration's proposal was embodied in identical bills, S. 3296 and H.R. 14765, 89th Cong. (1966). A copy of S. 3296 is printed at 112 CONG. REC. 9394-98 (1966), with the fair housing title appearing at 9396-97.

257. The provision that became § 3617, *see supra* note 65 and text accompanying note 249, also is similar to the one included in the Johnson Administration's initial proposal. *See, e.g.*, 114 CONG. REC. 9612 (1968) (describing the 1968 Senate-passed version of § 3617 that was ultimately enacted as "comparable" to the 1966 House-passed version of this provision, which was identical to the Johnson Administration's initial version, in a memorandum prepared late in the FHA's legislative history by the staff of the House Judiciary Committee).

As first proposed by the Johnson Administration in 1966, the FHA's § 3617-predecessor provided:

No person shall intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404.

of these provisions traces back to the Johnson Administration's initial proposal, which made it unlawful for homeowners, real estate brokers, and certain other categories of persons:

(a) To refuse to sell, rent, *or lease*, refuse to negotiate for the sale, rental, *or lease* of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale, rental, *or lease* of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.<sup>258</sup>

Other than the inclusion of the emphasized "lease" phrases, this is the same language that was ultimately adopted as § 3604(a) and § 3604(b).<sup>259</sup>

In response to the Administration's proposal, the House passed a fair housing bill later in 1966 with this identical language, albeit applying the language to a narrower group of potential defendants,<sup>260</sup> but this bill died in the Senate. In 1967, Senator Mondale proposed a fair housing bill,<sup>261</sup> which generally tracked

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*See* 112 CONG. REC. 9397 (1966) (sec. 405). Senator Mondale's 1967 version, consistent with its general approach, changed the introductory phrase to simply declaring these activities unlawful and also changed the order of the verbs (to "coerce, intimidate, threaten, or interfere with") and inserted "or protected" between "granted" and "by" in the final phrase. *See Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking and Currency*, 90th Cong. (1967) [hereinafter 1967 Banking Hearings] (setting forth sec. 7 of Senator Mondale's bill). Substantively, this version was adopted verbatim in Senator Dirksen's version. *See* 114 CONG. REC. 4573 (1968) (sec. 217). The Dirksen version, which ultimately was enacted, did change the placement of this provision to the end of the statute and therefore made it not subject to the enforcement provisions governing the FHA's other substantive prohibitions, but instead provided a new concluding sentence, stating: "This section may be enforced by appropriate civil action." 42 U.S.C. § 3617 (Supp. V 1969) (amended 1988). The 1988 FHAA reversed this last change, making a § 3617 violation "a discriminatory housing practice" that, like those in §§ 3604-3606, may be enforced through the FHA's regular enforcement procedures. *See* 42 U.S.C. § 3602(f) (2000).

258. *See* 112 CONG. REC. 9397 (1966) (emphasis added).

259. *See supra* notes 48-49.

260. *See* 112 CONG. REC. 18,739-40 (1966) (reporting passage of the bill); *infra* note 268 ¶ 2 (describing narrower group of potential defendants). The House-passed version included a number of other changes to the Administration's proposal, none of which is relevant to the meaning of § 3604(a) and § 3604(b). These changes are described in Schwemm, *supra* note 251, at 201-02 nn.56-59.

261. Senator Mondale's bill (S. 1358) was the subject of hearings by a subcommittee of the Senate Banking and Currency Committee. *See* 1967 Banking Hearings, *supra* note 257. S. 1358, which is printed in *id.* at 438-59, was identical to the fair housing title of a civil rights bill proposed by the Johnson Administration in 1967 (S. 1026 and H.R. 5700), which was the subject of hearings by a subcommittee of the Senate Judiciary Committee. *See* Hearings before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 1026, S. 1318, S. 1359, S. 1362, S.

the House-passed version, but deleted the “or lease” phrase from these two provisions and thus contained the exact language that ultimately became § 3604(a) and § 3604(b).<sup>262</sup> This same language was also included in the Mondale-Brooke proposal of early 1968<sup>263</sup> and in Senator Dirksen’s compromise proposal later that year,<sup>264</sup> which, with a few minor floor amendments,<sup>265</sup> eventually became the FHA.<sup>266</sup>

Although the wording of § 3604(a) and § 3604(b) changed little throughout this two-year process, two other provisions relevant to the meaning of these subsections did undergo important changes. The most significant was that the early versions limited those covered by these prohibitions to certain specified entities, following the approach of Title VII, the employment discrimination law passed in 1964.<sup>267</sup> Thus, in both the initial Johnson Administration proposal and the 1966 House-passed version, only those directly involved in selling or renting

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1462, H.R. 2516 and H.R. 10805 (*Proposed Civil Rights Act of 1967*), 90th Cong. (1967) [hereinafter 1967 *Judiciary Hearings*]. Apart from these hearings, no further action was taken on these bills in 1967.

262. For a description of the changes made by Senator Mondale’s 1967 bill to the 1966 House-passed version, see Schwemm, *supra* note 251, at 202-03 nn.60-63 and accompanying text. Senator Mondale’s deletion of “lease” from the key substantive provisions, thus limiting these prohibitions to “sales” and “rentals,” was accompanied by adding a definition of “to rent” that included “to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant,” which ultimately was enacted as § 3602(d). Thus, deleting “lease” from the substantive prohibitions served only to simplify the phrasing of these provisions, without narrowing their coverage.

263. The Mondale-Brooke proposal took the form of an amendment offered to another civil rights bill that had been passed by the House without a fair housing title and was then pending on the Senate floor. *See* 114 CONG. REC. 2270-72 (proposal printed), 2279 (amendment formally offered by Sen. Mondale) (1968). The Mondale-Brooke proposal was identical to Senator Mondale’s 1967 bill in all key respects, save one: it added the House-passed version of the “Mrs. Murphy” exemption at the end of its main substantive section. *See* 114 CONG. REC. 2270 (1968) (§ 4(f)).

264. The Dirksen proposal is printed at 114 CONG. REC. 4570-73 (1968). The changes made by this proposal to the Mondale-Brooke version, none of which related to the language that became § 3604(a) and § 3604(b), are described in Schwemm, *supra* note 251, 204-05 nn.67-74 and accompanying text.

265. For a description of these amendments, none of which related to the substantive scope of what became § 3604(a) and § 3604(b), see Schwemm, *supra* note 251, at 205 n.76.

266. As so amended, the Dirksen proposal was passed by the Senate on March 11, 1968. *See* 114 CONG. REC. 5992 (1968). Shortly after Dr. King’s assassination, the House voted to accept the Senate-passed version. *See id.* at 9620-21. The next day, April 11, President Johnson signed the bill into law. *See* Lyndon B. Johnson, *Remarks upon Signing the Civil Rights Act*, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1968-69, at 509-10 (1970).

267. Title VII’s prohibitions are limited to employers, employment agencies, labor organizations, and training programs. *See* 42 U.S.C. §§ 2000e-2(a) to (d), 2000e-3(a) (2000).

housing were to be covered by the prohibitions of § 3604(a) and § 3604(b).<sup>268</sup> Therefore, had either of these versions passed, local governments would not have been included as potential defendants, except to the extent they were involved in selling, renting, or managing housing.<sup>269</sup>

Beginning with Senator Mondale's 1967 proposal, the lead-in to what became § 3604 was changed by deleting these lists of potential defendants and simply declaring that “[i]t shall be unlawful” to engage in the practices set forth in this provision's subsections. This version was ultimately enacted, with the result that § 3604(a) and § 3604(b) have been read to cover *all* persons and entities, including municipalities, that violate these provisions.<sup>270</sup> However, because Senator Mondale's version did not significantly change the substantive phrases used in subsections (a) and (b), these phrases continued to owe their origin to drafters who had in mind only covering persons engaged in the sale, rental, or management of housing.

The second noteworthy change occurred in the FHA's introductory section defining the law's policy. The initial version of this section set forth in the Johnson Administration's 1966 proposal provided: “It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the

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268. In the Johnson Administration's proposed bill, the introduction to the substantive provision containing these subsections provided:

*It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling, or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman—*

112 CONG. REC. 9397(1966) (emphasis added to show language ultimately deleted in the FHA).

In the House-passed version, this lead-in list of covered entities was narrowed to apply only to real estate professionals and others in the housing business, thereby excluding homeowners and other non-professionals, as follows:

*It shall be unlawful for any person who is a real estate broker, agent, or salesman, or employee or agent of any real estate broker, agent, or salesman, or any other person in the business of building, developing, selling, renting, or leasing dwellings, or any employee or agent of any such person—*

See 112 CONG. REC. 18,112 (1966) (emphasis added to show language ultimately deleted in the FHA).

269. A noteworthy feature of the list of potential defendants in the Johnson Administration's proposed bill is that it included “manager[s]” and those who have “the authority to . . . manage” dwellings, *see supra* note 268 ¶ 1, thereby indicating coverage of discrimination directed against residents *after* they obtained their housing through a sale or rental agreement. Although the House-passed version deleted this reference to managers and otherwise narrowed the scope of this list, *see id.* ¶ 2, the fact remains that the Administration's version was the one that first proposed the operative language of what became § 3604(a) and § 3604(b), indicating that the drafters of these provisions *did* intend them to cover a time period extending beyond when housing is first acquired.

270. *See supra* notes 15-17 and accompanying text.

Nation.”<sup>271</sup> The significant point here is that the discrimination declared to be addressed by this statute was not limited to the purchase, rental, lease, and financing of housing, but also extended to discrimination in its “use and occupancy.” Had this version survived, it would have provided a strong indication that the protections of § 3604(a) and § 3604(b) were intended to cover current residents of housing and not just those seeking to buy or rent, as *Halprin* and *Cox* later concluded.<sup>272</sup>

But this version did not survive. It was part of the 1966 House-passed version,<sup>273</sup> but Senator Mondale’s 1967 version deleted the phrase “and the right of every person to be protected against” and also deleted “lease” and “use,” leaving it to read: “It is the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and occupancy of housing throughout the United States.”<sup>274</sup> The deletion of “lease” makes sense because Mondale also deleted this word from the rest of the statute,<sup>275</sup> but it is unclear why he deleted “use” while leaving in “occupancy.”

In any event, whatever interpretive meaning this version may have had was ultimately diluted by the fact that Senator Dirksen’s version changed it to read simply: “It is the policy of the United States to provide for fair housing throughout the United States.”<sup>276</sup> Senator Dirksen gave no explanation for this change,<sup>277</sup> and his version was ultimately enacted, after being amended on the Senate floor to include the phrase “within constitutional limitations.”<sup>278</sup>

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271. *See* 112 CONG. REC. 9396 (1966).

272. *See also supra* notes 187, 269.

273. *See* 112 CONG. REC. 18111 (1966).

274. *See* 1967 *Judiciary Hearings*, *supra* note 261, at 439.

275. *See supra* note 262.

276. 114 CONG. REC. 4571 (1968).

277. *Id.* For an argument that “the Dirksen substitute was seen by Congress as making only superficial changes to the bill’s policy statement” and that this statement’s changes from “use and occupancy” to “occupancy” and finally simply to a broad guarantee of “fair housing” do not indicate the statute should be limited to home-seeking as opposed to home-occupancy, see Short, *supra* note 81, at 231.

278. *See* 114 CONG. REC. 4985-86 (1968) (reporting passage of the amendment adding “within constitutional limitations”).

Despite these late changes in the FHA’s policy statement, its original version may still have some interpretive value. For example, Professor Oliveri has argued that the original policy statement supports construing the FHA to apply to post-acquisition discrimination:

There is . . . no indication that the change signaled Congress’ intent to exclude discrimination that affects occupancy from the list of conduct that the Act prohibits. If anything, the fact that a prohibition against discrimination in all aspects of housing—sales, rentals, financing, and occupancy—was included in the first three versions of the bill but omitted from the final version in favor of a broad statement of commitment to fair housing, indicates that Congress specifically intended “fair housing” to include the right to purchase, rent, finance, and occupy housing free of

### C. Source of the Language in § 3604(a) and § 3604(b)

1. *The 1964 Civil Rights Act.*—While it is clear that the key language of § 3604(a) and § 3604(b) traces back to the original 1966 proposal by President Johnson, it is not clear *why* such language was included in the Administration’s fair housing bill. None of the Administration’s explanations of this proposal focuses on the specific purpose or language of what was to become § 3604(a) and § 3604(b).<sup>279</sup>

Despite this lack of direct evidence concerning the rationale for the language used in the Administration’s 1966 bill, it seems likely that the source for much of this language was the employment discrimination law that Congress had enacted two years earlier as Title VII of the 1964 Civil Rights Act.<sup>280</sup> Indeed,

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discrimination.

Oliveri, *supra* note 82, at 28 (footnote omitted).

The argument is that the original drafters of § 3604(a) and § 3604(b) thought they were providing substantive prohibitions that could fairly be described as protecting, *inter alia*, the “use and occupancy” of housing. *See also Civil Rights: Hearing on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2846, S. 2923 and S. 3170 Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 308 (1966) [hereinafter 1966 Hearings] (setting forth a memorandum dated June 2, 1966, by the Library of Congress Legislative Reference Service on “The Power of Congress to Prohibit Racial Discrimination in the Rental, Sale, *Use, and Occupancy* of Private Housing” (emphasis added)); *id.* at 362 (statement of Frankie Freeman, U.S. Commission on Civil Rights) (describing the fair housing title of S. 3296 as outlawing discrimination “in the rental, sale, financing, *use, and occupancy* of housing” (emphasis added)); *id.* at 904 (statement of Sen. Robert C. Byrd) (addressing the question “Does Congress Have Power to Prohibit Racial Discrimination in the Rental, Sale, *Use, and Occupancy* of Private Housing?” (emphasis added)). As further evidence of the broad substantive scope of the original Johnson Administration’s proposal, a memorandum prepared for the House described the Administration’s bill as “imply[ing] the total elimination of discrimination in housing.” 112 CONG. REC. 18,117 (1966) (Legislative Reference Service, Library of Congress, “Analysis of the Open Housing Provisions of the Administration’s Proposed ‘Civil Rights Act of 1966’ as Amended by the House of Representative’s Committee on the Judiciary”).

This argument is the reason I use the word “diluted”—rather than, say, “eliminated”—in the text to describe the impact of the Dirksen changes to the FHA’s policy statement on the interpretive value of this statement’s earlier versions.

279. *See, e.g.*, 112 CONG. REC. 9399 (1966) (providing the Attorney General’s explanation of the bill, which includes only general statements about coverage and no specific reference to the prohibitory phrasing of the bill’s substantive provisions).

280. 42 U.S.C. §§ 2000e-2000e-17 (2000). The structure and much of the language used in the other two substantive antidiscrimination titles in the 1964 Civil Rights Act—Title II (“Public Accommodations”) and Title VI (“Federally Assisted Programs”)—generally do not parallel those of the Administration’s fair housing proposal. For example, unlike Title VII and the fair housing bill, which outlaw a series of enumerated practices if undertaken because of race or other prohibited ground, Title II simply uses one sentence to declare that “[a]ll persons shall be entitled to the full

many of the substantive provisions of the Administration's fair housing proposal closely track the language in Title VII,<sup>281</sup> and, to the extent these similarities were maintained in the enacted version of the FHA, courts have generally found it appropriate to interpret these provisions consistently with their Title VII counterparts.<sup>282</sup>

Specifically, Title VII made it unlawful for employers and certain other entities "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>283</sup> This single provision includes a prohibition against "otherwise . . . discriminat[ing] [in] terms, conditions, or privileges" that presumably spawned both the FHA's prohibition against "otherwise make unavailable" in § 3604(a) and its "terms, conditions, or privileges" prohibition in § 3604(b).

Beyond dividing these prohibitions into two subsections in the FHA, the Johnson Administration's 1966 proposal also added to subsection (b) a prohibition against discrimination "in the provision of services or facilities in

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and equal enjoyment" of places of public accommodations. *Id.* § 2000a-(a). Title VI provides a similarly cryptic guarantee that "[n]o person in the United States shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." *Id.* § 2000d.

As ultimately enacted, the FHA does contain certain exemptions that parallel some of those in Title II as well as Title VII. Compare 42 U.S.C. §§ 2000a(e), (b)(1) (Title II exemptions dealing with private clubs and "Mrs. Murphy" lodgings), and *infra* note 281 (describing Title VII exemptions) with the FHA's private club and "Mrs. Murphy" exemptions in 42 U.S.C. § 3607(a) and § 3603(b)(2), respectively. However, these FHA exemptions were not a part of the original fair housing bill proposed by the Johnson Administration in 1966. *See* sources cited *supra* note 256.

281. *See, e.g.*, *infra* text accompanying note 283 (quoting Title VII's key substantive provision, 42 U.S.C. §§ 2000e-2(a)(1), which outlaws practices that roughly correspond to the FHA's prohibitions in §3604(a) and §3604(b)). Title VII also prohibits retaliation against those who have exercised their rights under this statute, *id.* § 2000e-3(a), a provision that is somewhat similar to § 3617's protections against coercion and interference with fair housing rights. In addition, Title VII's exemptions for religious organizations, private clubs, and small employers, *see id.* § 2000e-1(a), § 2000e(b)(2), and § 2000e(b) respectively, are reflected in similar exemptions in the FHA. *See id.* §§ 3603(b), 3607(a).

282. *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 7.4 nn.3-4. *See generally* Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion) ("when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes" (citing *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973)); *see also* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-21 (1985) (relying on precedents interpreting Title VII's guarantee of nondiscrimination in "privileg[es] of employment" to interpret the same phrase in the 1967 Age Discrimination in Employment Act).

283. 42 U.S.C. § 2000e-2(a)(1); *see also id.* §§ 2000e-2(b), (c)(1), (d).

connection therewith.”<sup>284</sup> This phrase’s “services and facilities” language, while not in Title VII, may have been adopted from Title II of the 1964 Act, which prohibits discrimination in public accommodations by guaranteeing the “equal enjoyment of the goods, *services*, *facilities*, privileges, advantages, and accommodations” in such facilities.<sup>285</sup> Another possible source for the FHA’s “services and facilities” language may have been state fair housing laws in existence at the time the Johnson Administration drafted its 1966 proposal.<sup>286</sup>

Whatever its source, the FHA’s guarantee of nondiscrimination “in the provision of services or facilities in connection therewith” is a phrase whose meaning both with respect to the “services” covered and the target of the “in connection therewith” reference (i.e., “sale or rental of a dwelling” or just “a dwelling”) is important for purposes of determining the extent of § 3604(b)’s coverage. However, as to both issues, the meaning of this crucial phrase in § 3604(b) was never satisfactorily explained in the FHA’s legislative history.

Title VII’s prohibitory language makes clear that this statute protects against discrimination directed at current employees as well as job seekers by outlawing discrimination with respect to one’s “compensation, terms, conditions, or privileges of employment.”<sup>287</sup> However, in confining § 3604 to homeseekers, Judge Posner in *Halprin* wrote that, in contrast to Title VII, the FHA “contains no hint either in its language or its legislative history of a concern with anything but *access to housing*.”<sup>288</sup>

As shown in the previous section, this statement is clearly wrong as to the FHA’s legislative history.<sup>289</sup> As for the operative language of § 3604(b), it is, if anything, more broadly drawn than its Title VII counterpart. The FHA provision is not confined, as Title VII is, to discrimination “against an[] individual with respect to his” employment terms;<sup>290</sup> rather, § 3604(b) simply declares the discriminatory practices listed to be illegal without identifying the potential targets of such discrimination.<sup>291</sup> This, among other reasons, has led courts to entertain § 3604 claims by a variety of plaintiffs who were not the direct targets

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284. See *id.* § 3604(b); *supra* text accompanying note 258.

285. See 42 U.S.C. § 2000a(a) (emphasis added).

286. See, e.g., 1966 Hearings, *supra* note 278, at 430-31 (setting forth provisions of the Rhode Island fair housing law that barred managing agents and those having the right to manage housing accommodations from discriminating “in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of *facilities or services in connection therewith*” (emphasis added)); *id.* at 531 (setting forth the Ohio fair housing law that barred discrimination “in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any commercial housing or in furnishing *facilities, services, or privileges in connection with the ownership, occupancy, or use of any commercial housing*” (emphasis added)).

287. See *supra* text accompanying note 283.

288. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004).

289. See *supra* notes 258-78 and accompanying text.

290. 42 U.S.C. § 2000e-2(a)(1).

291. *Id.* § 3604(b).

of the defendant's discrimination.<sup>292</sup> Furthermore, as we have seen, § 3604(b)'s "services and facilities" phrase goes beyond anything included in Title VII's comparable provision. Therefore, the next section takes a closer look at this phrase and other key terms in § 3604(b).

2. *Other Interpretive Sources for Key Terms in § 3604(b): Dictionary Definitions, FHAA Examples, and § 1982 Precedents.*—The FHA has a section devoted to defining certain important terms and phrases in the statute;<sup>293</sup> however, except for "to rent,"<sup>294</sup> this section does not define the terms crucial to this Article, such as "services," "privileges," "sale," and "therewith" in § 3604(b).<sup>295</sup> The absence of such definitions in the FHA has been noted in a number of court opinions, particularly those attempting to give meaning to the word "services" in § 3604(b).<sup>296</sup>

Specific words in civil rights and other statutes are often interpreted by the modern Supreme Court by reference to their definitions in dictionaries that were commonly used at the time of enactment.<sup>297</sup> The theory is that Congress intends a statute's words to bear their contemporary common meaning.<sup>298</sup>

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292. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-78 (1982); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-12 (1972); *cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005) (construing Title IX to cover retaliation claims by indirect victims of sex discrimination because it bans discrimination "on the basis of sex" rather than, like Title VII, "on the basis of *such individual's* sex").

293. *See* 42 U.S.C. § 3602.

294. *See id.* § 3602(e). The definition of "to rent" is set forth *infra* in the text accompanying note 340; *see also supra* note 262 (discussing this definition).

295. *See* 42 U.S.C. § 3602. The text here discusses § 3604(b)'s language, but the same lack of statutory definitions—and the corresponding need for additional interpretive sources—exists for many of § 3604(a)'s key terms, including the word "sale" that is shared with § 3604(b) and § 3604(a)'s unique "make unavailable" phrase. *See id.* § 3604(a). As to the latter, the common dictionary definitions of "make" and "available" suggest that "make unavailable" means "to cause [housing not] to be obtainable, accessible, or ready for immediate use." *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED* 1363 (1966) [hereinafter WEBSTER'S] (defining "make" as "to cause to happen to or be experienced by someone"); *id.* at 150 (defining "available" as "that is accessible or may be obtained: personally obtainable").

296. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356 (6th Cir. 1995) (noting that "[t]he Fair Housing Act does not define key terms such as 'service'" (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992))); *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, Inc.*, 456 F. Supp. 2d 1223, 1227-28 (S.D. Fla. 2005) (noting that the FHA does not define "services").

297. *See, e.g.*, *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 63-67 (2006) (interpreting Title VII); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69 & n.9 (1989) (interpreting the 1871 Civil Rights Act, 42 U.S.C. § 1983); *St. Francis Coll. v. Al-Khzraji*, 481 U.S. 604, 610-11 (1987) (interpreting the 1866 Civil Rights Act).

298. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning." (citing

As for the word “services” in § 3604(b), the most prominent American dictionary available at the time of the enactment of the 1968 FHA provided the following applicable definitions of “service”: “an act done for the benefit or at the command of another”; and an “action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental towards some object.”<sup>299</sup> This definition is so broad—e.g., any conduct that “assists or benefits someone”—that it is unhelpful.

More to the point would be what are considered “housing-related” services. In this regard, the 1988 FHAA’s legislative history does identify “cleaning and janitorial services” as an example of this concept for purposes of disability-based claims under § 3604(f)(2),<sup>300</sup> suggesting that “services” in the FHA does include those provided in the post-acquisition-of-housing stage.<sup>301</sup> As we have seen,

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Smith v. United States, 508 U.S. 223, 228 (1993)); Perrin v. United States, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975)); *see also* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (relying, in choosing among various dictionary definitions of the relevant term in a statute, primarily on those dictionaries that were available at the time of the statute’s enactment); case described *supra* note 255.

299. WEBSTER’S, *supra* note 295, at 2075 (definitions 5 and 9 of “service”); *see also* BLACK’S LAW DICTIONARY 1533 (4th ed. 1968) [hereinafter BLACK’S] (defining “service” as: “Performance of labor for benefit of another, or at another’s command”).

300. *See supra* text accompanying note 196.

301. The 1988 FHAA included one other provision, since repealed, that mentioned “facilities and services.” This was in a part of the “housing for older persons” exemption to the FHAA’s prohibition of familial status discrimination. *See* 42 U.S.C. § 3607 (1988) (amended 1995). The FHAA’s § 3607(b)(2) described three types of housing that would qualify for this exemption, one of which was housing intended for occupancy by persons fifty-five years of age or older and that included “significant facilities and services specifically designed to meet the physical or social needs of older persons.” *Id.* § 3607(b)(2)(C). HUD promptly issued a regulation interpreting this provision, which provided:

“Significant facilities and services specifically designed to meet the physical or social needs of older persons” include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of [sic] programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them.

24 C.F.R. § 100.304(b)(1) (1993).

This “significant facilities and services” requirement spawned a great deal of litigation, which led Congress to repeal it in 1995. *See* Housing for Older Persons Act of 1995, Pub. L. 104-76, 109 Stat. 787; Taylor v. Rancho Santa Barbara, 206 F.3d 932, 935 (9th Cir. 2000). However, in the meantime, the courts produced a number of opinions dealing with the meaning of “significant facilities and services.” *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 11E:8 n.5 para. 3.

The value of these cases and the HUD regulation is limited for purposes of providing examples

Congress was clearly concerned with post-acquisition services as well as those connected with the acquisition of a dwelling.<sup>302</sup> With respect to acquisition-of-housing services—which *Halprin* and *Cox* contend was the only focus of the 1968 Congress in § 3604(b)<sup>303</sup>—the technique of using dictionary definitions is not too helpful. Clearly such housing-acquisition services do exist, as demonstrated by cases that have held § 3604(b) applicable to home insurance for would-be buyers<sup>304</sup> and to sales agents’ racial steering of homeseekers.<sup>305</sup> Pre-

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of “services” covered by § 3604(b), however, because they tended to focus only on services provided by senior-oriented housing facilities, as opposed to those provided by more traditional housing and by third parties such as municipalities. *See, e.g.*, *United States v. City of Hayward*, 36 F.3d 832, 837-38 (9th Cir. 1994) (holding that the particular housing complex here—although having a swimming pool, sauna, shuffle board, laundry room, reading room, and clubhouse, and allowing outside health professionals to conduct blood pressure and glaucoma checks and administer flu shots—only “provided those facilities which any landlord expecting to please his or her tenants would provide” and thus did not satisfy the statute’s “significant facilities and services” for older persons requirement).

302. *See supra* notes 195-201 and accompanying text.

303. *See supra* texts accompanying notes 66-70 (*Halprin*) and notes 98-101 (*Cox*). According to the *Cox* opinion: “Even assuming that the enforcement of zoning laws alleged here is a ‘service,’ we hold that § 3604(b) is inapplicable here because the service was not ‘connected’ to the sale or rental of a dwelling as the statute requires.” *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (footnote omitted).

304. *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298-301 (7th Cir. 1992) (holding that property insurance is a “service” under § 3604(b) and noting: “If the world of commerce is divided between ‘goods’ and ‘services,’ then insurers supply a ‘service.’ . . . [Thus,] § 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.”); *cf. Nevels v. W. World Ins. Co.*, 359 F. Supp. 2d 1110, 1120 (W.D. Wash. 2004) (holding, in disability discrimination case under § 3604(f)(2), that defendant’s cancellation of housing providers’ liability insurance constituted discrimination “in the provision of services related to a dwelling” and that “[p]roperty insurance is without question a service provided in connection with a dwelling”); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 7-8 (D.D.C. 1999) (upholding § 3604(f)(2) claim of disability discrimination against insurance provider).

305. *See, e.g.*, *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (opining that a real estate broker who falsely states to a black customer that no homes are for sale in a white area because of the customer’s race violates § 3604(b) by discriminating “in the provision of real estate services”); *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980) (holding that a real estate agent who “failed to tell [black prospects] of the listing of the . . . property until forced to do so and still later . . . clearly made available information to a white prospect which he had not made available to a willing black buyer” thereby violated § 3604(b)); *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977) (holding that racial steering “violates the broader language of § 3604(b), which makes it unlawful to ‘discriminate . . . in the provisions of services’”); cases cited in *SCHWEMM, supra* note 13, § 14:2 n.18; *see also* 24 C.F.R. § 100.65(b)(3) (2007) (interpreting § 3604(b) to prohibit “[f]ailing to process an offer for the sale or rental of a dwelling or to communicate an offer accurately because of race [or other prohibited

*Halprin* cases had also applied § 3604(b)'s guarantee of nondiscriminatory services in post-acquisition situations, such as the provision of maintenance by landlords.<sup>306</sup>

The phrase "in connection therewith" that modifies "services" in § 3604(b) does not appear in traditional dictionaries. The word "therewith" is defined as "with that," and "that" means "being the person, thing, or idea pointed to, mentioned, or understood from the situation: being the one indicated."<sup>307</sup> However, these definitions do not help resolve the key question, which is to *what* the "services" in § 3604(b) point. The courts have thought the choices are the earlier references to either "a dwelling" (which would yield a broader reading of § 3604(b)-covered services) or the "sale or rental of a dwelling" (which would yield a narrower reading).<sup>308</sup> In any event, the proper interpretation is more a matter of grammar and syntax than the definition of terms.

"Therewith" is an ambiguous adverb, rarely used in grammar or style textbooks.<sup>309</sup> As noted in the previous paragraph, its meaning depends on the construction of the particular sentence involved. That is not helpful in examining § 3604(b), because the structure of that provision makes it difficult to determine exactly to what "thing" is being "pointed." The best way to make this determination is to diagram the sentence that makes up § 3604(b), which yields the following:

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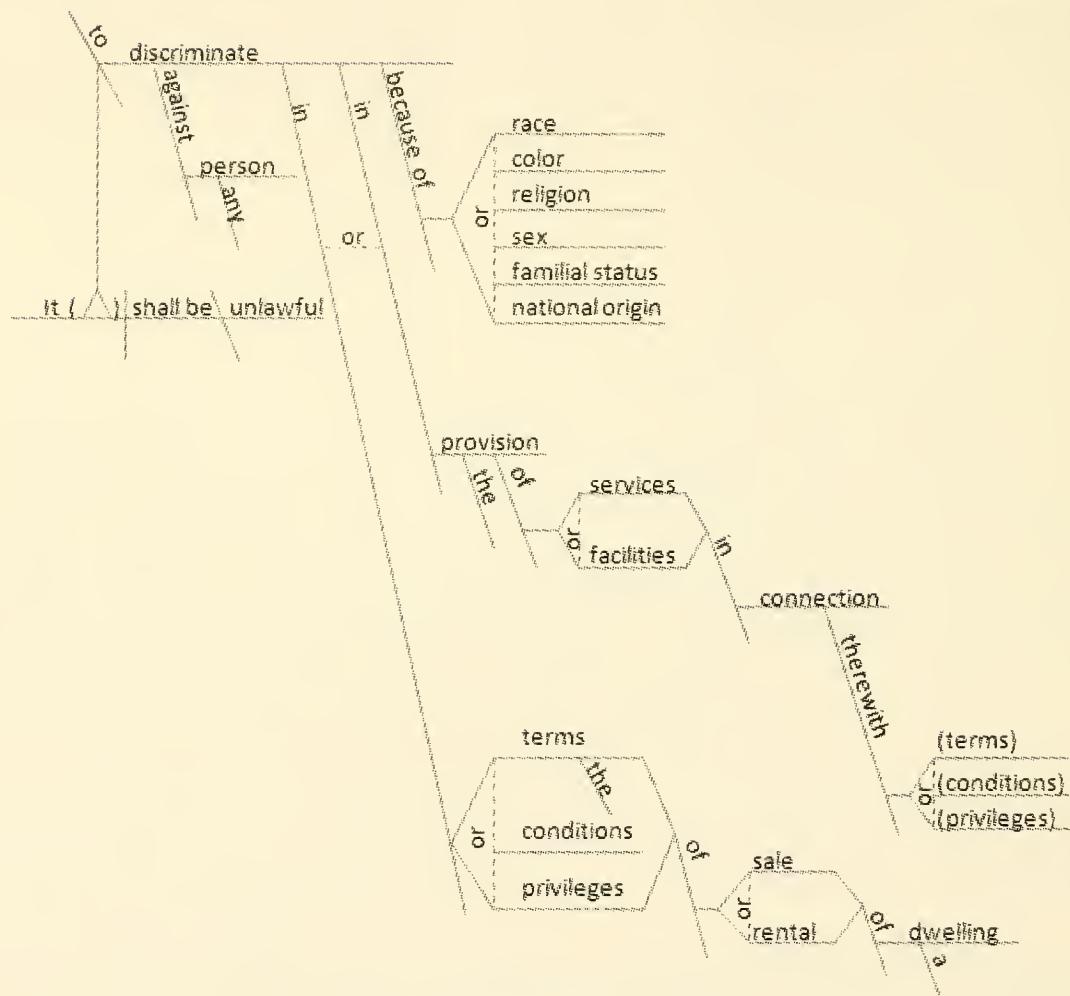
ground]"').

306. See, e.g., *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522, 525-26 (N.D. Ill. 1980); *see also Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) (commenting that § 3604(b) was intended to protect residents with discriminatory service claims against housing providers); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999) (holding that defendant's non-renewal of property insurance and its charging higher rates in black areas may violate plaintiff-homeowners' § 3604(b) rights, because "the provision of property insurance can be reasonably interpreted as the 'provision of services or facilities in connection' with the sale or rental of a dwelling" and "[m]aintaining possession of a home is as important to a homeowner as obtaining possession of a home"); *Implementation of the Fair Housing Amendments Act of 1988*, 54 Fed. Reg. 3232, 3239 (Jan. 23, 1989) (commenting, in the course of issuing HUD's regulations interpreting the FHA, that § 3604(b) covers "the provision of different levels of maintenance").

307. WEBSTER'S, *supra* note 295, at 2367, 2372.

308. *See supra* note 202 and accompanying text.

309. "Therewith" is generally not even mentioned in classic works on style. *See, e.g.*, THE CHICAGO MANUAL OF STYLE 917 (14th ed. 1993) (providing no reference in the index to "therewith"); LESTER FAIGLEY, THE PENGUIN HANDBOOK 856 (2003) (same) WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE 104 (4th ed. 2000) (same); *see also* MARGARET NICHOLSON, A DICTIONARY OF AMERICAN-ENGLISH USAGE 585-86 (1957) (containing no entry for "therewith").



(Bear with me here: my Mother was a grade-school English teacher, as was my current research assistant.<sup>310</sup>)

This diagram reveals that, from a grammatical standpoint, neither “a dwelling” nor the “sale or rental of a dwelling” is the target for § 3604(b)’s “therewith” clause; rather, “therewith” refers to the phrase “in the terms, conditions, or privileges.”<sup>311</sup> This is an adverbial prepositional phrase describing *how* one discriminates under § 3604(b), while both “a dwelling” and the “sale or rental of a dwelling” are prepositional phrases that further explain what types of

310. Sarah Sloan Wilson, J.D. Candidate, 2009, University of Kentucky College of Law. Ms. Wilson, who generated the diagram of § 3604(b) in the text, taught middle- and high-school English at King’s West School, Bremerton, Washington, in 2004-06, where her basic grammar text was WARRINER’S ENGLISH GRAMMAR AND COMPOSITION (1982 ed.).

311. See 42 U.S.C. § 3604(b) (2000).

“terms, conditions, and privileges” discrimination are prohibited.<sup>312</sup> In other words, the phrase “*of* sale or rental *of* a dwelling” is itself comprised of two modifying prepositional phrases, and thus the “thing” referenced by the “therewith” clause is discrimination in the entire phrase “terms, conditions, or privileges of sale or rental of a dwelling.”<sup>313</sup>

While this may be grammatically correct, it does not yield a helpful interpretation of § 3604(b)’s “services or facilities in connection therewith” clause, which clearly was intended by Congress to add new types of prohibited discrimination to the earlier prohibitions against “terms, conditions, or privileges” discrimination.<sup>314</sup> Therefore, it is understandable that courts have interpreted § 3604(b)’s use of “in connection therewith” to refer either to “a dwelling” or to the “sale or rental of a dwelling.”<sup>315</sup> The main point here is that, while a court may pick one or the other of these options, its choice cannot be defended on the basis of correct grammar, as Judge Higginbotham tried to do in *Cox*,<sup>316</sup> because either option is “wrong” grammatically, the choice must turn instead on what Congress intended substantively. And on this point, we have scant evidence from the 1968 legislative history.<sup>317</sup> However, even assuming the narrower interpretation (i.e., that “services” are limited to those “in connection” with the “sale or rental of a dwelling”<sup>318</sup>), the proper interpretation of § 3604(b) should still extend to many post-acquisition situations, as the following paragraphs show.

With respect to the concept of “privileges” in § 3604(b)—which the statute clearly does limit to those “privileges of sale or rental of a dwelling”<sup>319</sup>—the most prominent contemporary dictionary provided the following definitions of “privilege”: “a right or immunity granted as a peculiar benefit, advantage, or favor: special enjoyment of a good or exemption from an evil or burden: a peculiar or personal advantage or right [especially] when enjoyed in derogation of common right[s].”<sup>320</sup> The fact that a privilege is something to be “enjoyed”

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312. *See id.*

313. *See id.* (emphasis added).

314. *See id.*

315. *See id.*

316. *See Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding that § 3604(b)’s “in connection therewith” phrase refers to the “sale or rental of a dwelling” rather than “a dwelling” on the ground that the former reading is “grammatically superior”).

317. *See supra* Part III.B.

318. *See* 42 U.S.C. § 3604(b) (2000).

319. *Id.* § 3604(b); *see also Cox*, 430 F.3d at 745 n.32.

320. WEBSTER’S, *supra* note 295, at 1805 (definition 1 of “privilege”); *see also* BLACK’S, *supra* note 299, at 1359, 1361 (defining “privilege” as: “A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens” and defining “special privilege” as: “A right, power, franchise, immunity, or privilege granted to, or vested in, a person or class of person, to the exclusion of others, and in derogation of common right”).

may suggest that it is an on-going condition that exists over time.<sup>321</sup> Furthermore, a housing-related example based on the 1988 FHAA's legislative history is "parking privileges . . . and other facilities . . . made available to other tenants, residents, and owners."<sup>322</sup> This statement clearly contemplates post-acquisition privileges, but, as noted above, the 1988 Congress's concern with post-acquisition privileges was reflected in the statutory language of § 3604(f)(2).<sup>323</sup> In order to properly interpret "privileges" in § 3604(b)—and to determine whether this concept might include post-acquisition privileges—the entire phrase "privileges of sale or rental of a dwelling" must be considered.<sup>324</sup> This approach was the basis for Judge Higginbotham's determination in *Cox* that § 3604(b)'s "privileges" did not cover the plaintiff-homeowners' claim challenging the City's refusal there to use its zoning power to help clean up hazardous wastes in the plaintiffs' neighborhood.<sup>325</sup>

If *Cox* is right that enjoying municipal protection against hazardous wastes is not a "privilege of sale or rental,"<sup>326</sup> then what is such a privilege? Case law here is not too helpful, because, in contrast to the many "services" cases under § 3604(b),<sup>327</sup> there is a dearth of reported FHA cases dealing with a claim based solely on the term "privileges" in § 3604(b).<sup>328</sup>

Presumably, "privileges" here adds some protection to that of "services" and the other terms used in § 3604(b), for a basic tenet of statutory construction holds that each word in a statute must be accorded some meaning.<sup>329</sup> Thus, one must be able to imagine *some* "privileges of sale"<sup>330</sup> that do extend beyond the acquisition stage. One possibility is the classic "exclusion of others" that is a core right inherent in ownership of real property;<sup>331</sup> another possibility is

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321. *See also* *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (criticizing *Halprin*'s view that § 3604(b) does not extend beyond the housing-acquisition stage in the course of holding that this provision applies to a sex-harassment-in-rental claim and arguing that "it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein").

322. *See* H.R. REP. NO. 100-711, at 23 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2184.

323. *See supra* text accompanying notes 194-95.

324. *See* 42 U.S.C. § 3604(b) (2000).

325. *See Cox v. City of Dallas*, 430 F.3d 734, 745 n.32 (5th Cir. 2005).

326. *See* 42 U.S.C. § 3604(b) (2000).

327. *See supra* notes 296, 301, 304-06 and accompanying text.

328. For a rare example, see *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) (described *supra* note 321).

329. *See, e.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697-98 (1995) (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

330. *See* 42 U.S.C. § 3604(b).

331. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176-80 (1979) (noting that a landowner's right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" and that "the 'right to exclude' [is] universally held to be a fundamental element of the property right"). *See generally* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

discussed later in this section.<sup>332</sup>

A useful case to consider here is *Sullivan v. Little Hunting Park, Inc.*,<sup>333</sup> which the Supreme Court decided in 1969, one year after it first held that 42 U.S.C. § 1982 barred private housing discrimination along with the recently enacted FHA.<sup>334</sup> In *Sullivan*, the Court held that § 1982's guarantee of the equal right "to . . . lease . . . property" protected a black tenant who had rented a house and thereafter was denied access to a local park and community facility that tied membership to residency in the area.<sup>335</sup> According to the *Sullivan* opinion:

There has never been any doubt but that [the black renter] paid part of his \$129 monthly rental for the assignment of the membership share in Little Hunting Park. The transaction clearly fell within the "lease." The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor. [Defendants'] actions in refusing to approve the assignment of the membership share in this case was clearly an interference with [the black renter's] right to "lease."<sup>336</sup>

The lesson here is that, given the 1969 Court's determination that the right "to lease" in § 1982 protects tenants even after they have acquired their units, the same understanding of the time period covered by the FHA's "rental" in § 3604(b) would make this provision similarly applicable to the post-acquisition phase. This idea is further explored in the next two paragraphs.

Another dramatic point from *Sullivan* is provided by the dissent, which argued that the Court should avoid using this case to issue an expansive ruling on § 1982 because its fact pattern was so obviously covered by the new FHA. According to Justice Harlan for the three dissenters in *Sullivan*:

Petitioners here complain of discrimination in the provision of recreation facilities ancillary to a rented house . . . . [T]he Fair Housing Law has a provision that explicitly makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of . . . rental (of housing), or in the provisions [sic] of services or facilities in connection therewith, because of race . . . ."

....

... [T]he existence of the Fair Housing Law renders the decision of this case of little "importance to the public." For, although the 1968 Act does not cover this particular case [because the events preceded the FHA's enactment], should a Negro in the future rent a house but be denied access to ancillary recreational facilities on account of race, he could in all likelihood secure relief under the provisions of the Fair

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332. See *infra* text accompanying notes 347-49.

333. 396 U.S. 229 (1969).

334. See *supra* note 128 and accompanying text.

335. *Sullivan*, 396 U.S. at 237.

336. *Id.* at 236-37.

Housing Law.<sup>337</sup>

This passage shows that even the *Sullivan* dissenters understood that § 3604(b) protects renters after they take possession of their units. Furthermore, the less-than-certain tone of this passage's final sentence—reflected in the statement that such renters “could in all likelihood” secure relief under the FHA—was only based on the possibility that the unit involved might be subject to one of the FHA's exemptions, as Justice Harlan pointed out in a footnote;<sup>338</sup> if a unit is not exempt, the *Sullivan* dissent was clear that post-acquisition tenants subjected to discriminatory services or facilities are covered by § 3604(b).<sup>339</sup>

These points from *Sullivan* are reinforced by the FHA's definitions section, which provides: “‘To rent’ includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.”<sup>340</sup> Thus, the concept of “rental” in the FHA explicitly includes “to lease” (i.e., the concept given post-acquisition protection in *Sullivan*). Admittedly, the FHA's “rent” definition, which simply includes additional terms rather than defining what “rent” means, does not address the timing problem of whether § 3604(b)'s protections extend into the post-acquisition period. This, however, is where a dictionary definition is helpful. The standard definition in dictionaries available when the 1968 FHA was enacted defines “rent” to include “the possession and use” and the “possession and enjoyment” of property,<sup>341</sup> suggesting that “rental” in the FHA should be understood to cover the entire time period of a tenancy. Thus, both *Sullivan* and the common meaning of “rental” provide powerful arguments that § 3604(b) protects residents as well as homeseekers, at least in “rental” situations.<sup>342</sup>

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337. *Id.* at 247-51 (Harlan, J., dissenting) (footnote omitted).

338. *Id.* at 251 & n.24.

339. *Id.* at 250-51.

340. 42 U.S.C. § 3602(e) (2000).

341. WEBSTER'S, *supra* note 295, at 1923; *see also* BLACK'S, *supra* note 299, at 1461 (defining “rent” as: “Consideration paid for use or occupancy of property”).

342. Post-*Halprin* decisions have generally upheld § 3604(b) claims by current tenants. *See, e.g.*, Krieman v. Crystal Lake Apartments Ltd. P'ship, No. 05C0348, 2006 WL 1519320, at \*6-7 (N.D. Ill. May 31, 2006) (reading *Halprin* as allowing plaintiff-tenants' discriminatory services claim under § 3604(b) because “the delay in maintenance services could be viewed as a denial of access to the services to which [plaintiffs] were entitled under the terms of the lease,” but entering summary judgment against this claim based on inadequate proof of illegal discrimination); Richards v. Bono, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at \*2-5 & n.16 (M.D. Fla. May 2, 2005) (upholding § 3604(b) claim by tenant alleging sexual harassment by her landlord in part based on deference to HUD's regulation interpreting § 3604(b) as applying to post-acquisition rental discrimination, which the court held to be a reasonable interpretation “even if one considered the phrase ‘in connection therewith’ to refer to ‘rental’ rather than ‘dwelling’”); *see also* United States v. Matusoff Rental Co., 494 F. Supp. 2d 740, 746-48 & n.11, 752 (S.D. Ohio 2007) (awarding damages to tenant for landlord's violations of § 3604(a) and § 3604(b) by, *inter alia*, denying repair work and other needed maintenance based on tenant's race); Campos v. Barney G, Inc., No.

The timing issue is less clear with respect to § 3604(b)'s coverage of "sales." The basic definition of "sale" is "the act of selling: a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price . . . ; *specif.* a present transfer of such ownership of and title to all of or a part interest in personal property."<sup>343</sup> The key here is not so much the body of this definition, but its introductory word—the use of "the" or "a"—which suggests that "sale," unlike "rental," generally refers to a one-time event rather than an on-going process. Significantly, *Halprin* and most other cases—including *Cox*—that have advocated limiting § 3604(b) to the pre-acquisition phase have been brought by plaintiff-homeowners rather than plaintiff-renters.<sup>344</sup> Dictionary definitions, therefore, provide some basis for arguing that § 3604(b) should not extend to the post-acquisition stage in "sale" situations, even if it is not so limited in "rental" cases.<sup>345</sup>

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8:06CV699, 2007 U.S. Dist. LEXIS 24841, at \*3-5 (D. Neb. Apr. 3, 2007) (awarding damages to Hispanic tenants who sued their landlord for post-acquisition "terms and conditions" discrimination); *United States v. Kreisler*, No. 03-3599, slip op. at 2, (D. Minn. Sept. 29, 2006), available at <http://www.usdoj.gov/crt/housing/documents/kreislersettle.pdf> (entering consent decree in case accusing landlord of violating the FHA by, *inter alia*, "failing to provide necessary and requested maintenance to black tenants while providing such maintenance to non-black tenants"); cases described *infra* note 345.

343. WEBSTER'S, *supra* note 295, at 2003 (definition 1 of "sale"); *see also* BLACK'S, *supra* note 299, at 1503 (defining "sale" as: "A contract between two parties . . . by which the [seller-vendor], in consideration of the payment or promise of payment of a certain price in money, transfers to the [buyer-purchaser] the title and the possession of property"; and "A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title").

344. *See* cases cited in SCHWEMM, *supra* note 13, § 14:3 n.20 ¶ 1. Even in "sale" situations, however, some courts have upheld § 3604(b) claims by current homeowners. *E.g.*, *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 808-09 (W.D. Tenn. 2005); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1083-84 (C.D. Cal. 2002); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993); *see also* *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 943-45 (8th Cir. 2006) (upholding standing of residents of minority neighborhood to sue under the FHA, § 1981, and § 1982 based on allegation that defendants charged higher rates for homeowner's insurance in plaintiffs' neighborhood than in comparable white areas); *United Farm Bureau Family Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1012-16 (7th Cir. 1994) (holding that the FHA and a substantially equivalent local fair housing ordinance cover claim by white resident that insurance company declined to renew his homeowner's policy because he lived in a racially mixed neighborhood); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 20-22 & n.7 (D.D.C. 2000) (suggesting that "reverse redlining" claim by current homeowners targeted for predatory home-improvement loans might be maintained under § 3604); *Reeves v. Carrollsburg Condo. Owners Ass'n*, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at \*5-8 (D.D.C. Dec. 18, 1997) (citing § 3604(a), § 3604(b), and § 3617 in upholding condominium owner's FHA claim of race and sexual harassment against association of condominium unit owners).

345. Indeed, some post-*Halprin* decisions have noted this distinction explicitly as a basis for endorsing post-acquisition claims by renters. *See* *Gourlay v. Forest Lake Estates Civic Ass'n of*

However, the question of whether there is any such thing as a post-acquisition “privilege of sale” remains. One possibility might be the privilege of joining local recreational clubs whose membership is tied to residency in the area, as the Supreme Court has recognized in some § 1982 cases decided shortly after the FHA’s enactment. For example, in 1973 in *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*,<sup>346</sup> the Court relied on *Sullivan* to uphold a § 1982 claim by local black homeowners who were denied membership in an area swim club.<sup>347</sup> In *Tillman*, the Court noted that the club’s residency-linked preferences

may have affected the price paid by the [black homeowners] when they bought their home. Thus, the purchase price to them, like the rental paid by [the black tenant] in *Sullivan*, may well reflect benefits dependent on residency in the preference area. For them, however, the right to acquire a home in the area is abridged and diluted.

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as are enjoyed by a white resident.<sup>348</sup>

Although *Tillman* used the word “benefits” rather than “privileges” to describe the residency-based right there, such a right could certainly be considered a “privilege” of sale for purposes of § 3604(b). Indeed, at least one post-*Halprin* opinion has ruled that the right of homeowners in a planned community to have access to their community’s clubhouse and other common areas is a “privilege” of sale covered by § 3604(b).<sup>349</sup>

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Port Richey, Inc., 276 F. Supp. 2d 1222, 1230-31 n.11 (M.D. Fla. 2003), *order vacated pursuant to settlement*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003) (commenting, in rejecting a post-acquisition § 3604(a) claim by homeowners, that the time frames covered in rental and sale situations are different, because “a landlord and tenant have an ongoing relationship that a purchaser and seller do not have. This would make activities by a landlord or others actionable after the rental of a dwelling.”); *see also* Corwin v. B’Nai B’Rith Senior Citizen Hous., Inc., 489 F. Supp. 2d 405, 408-09 (D. Del. 2007) (commenting, after quoting § 3604(b), that “[t]he FHA demands that tenants be able to secure an apartment on a nondiscriminatory basis, and also guarantees tenants the right to equal treatment once they have become residents of that housing” (citing *Inland Medication Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1148 (C.D. Cal. 2001))).

346. 410 U.S. 431 (1973).

347. *Id.* at 435-37.

348. *Id.* at 437.

349. *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Ass’n, Inc.*, 456 F. Supp. 2d 1223, 1229-31 (S.D. Fla. 2005). In *Savanna Club*, the court, while generally agreeing with *Halprin* and *Cox* that § 3604(b) is limited to the acquisition-of-housing stage, did not agree that such an interpretation could

apply to unique planned communities such as Savanna. Ordinarily, a homeowner

#### *D. Summary*

This Part's sections A-C yield the following conclusions:

—The original drafters of the substantive provisions of § 3604—and in particular its subsection (b)—were focused on identifying discriminatory practices that would be made illegal if engaged in by housing providers, including those who “manage” housing units.

—This fact means that the substantive prohibitions in § 3604(b)—and in particular its prohibition against discriminatory “services” and “privileges”—were drafted with housing providers in mind, which may be one reason why determining how to apply them to other types of defendants (e.g., municipalities) has proved difficult for the courts.

—It also means that these prohibitions were intended to protect current residents—as well as those seeking to acquire housing—from discrimination by housing managers (and ultimately other proper defendants) in such things as cleaning and janitorial services and maintenance, at least in “rental” settings.

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purchases a home for the home itself. After the sale, provision or lack of provision of services for that homeowner might decrease his enjoyment of his home, but absent some interference with his ability to inhabit it, the *Halprin* line of cases have found the FHA to be inapplicable. *Halprin*, and other similar cases, however, did not directly address the provision of services as they relate to planned communities where some types of services are in fact part and parcel with home ownership.

....

Most of these communities have common areas which are maintained and regulated by the community's homeowner association for the use by the homeowner members. . . .

Accordingly, part and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community. It would appear, therefore, that in the context of planned communities, where association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the FHA. . . .

....

. . . . [Thus,] the Court finds that the FHA can apply to some post-acquisition provision of services in the planned community context where the services are an incident of ownership . . . .

*Id.* at 1229-31 (citations and footnotes omitted). As this quotation demonstrates, the *Savanna Club* opinion relies both on the “services” and “privileges” language of § 3604(b), but, in either case, the opinion recognizes the possibility that such services or privileges “of sale” may extend into the post-acquisition phase, at least in planned communities and other home-ownership situations where access to common areas is “part and parcel” of the right of ownership. *Id.*

—The conclusion that § 3604(b) extends to post-acquisition discrimination in rentals is reinforced by the fact that those same drafters wrote an introductory policy statement describing the FHA as protecting, *inter alia*, the “use and occupancy” of housing and by the fact that the common dictionary meaning of their oft-used word “rental” covers a tenant’s entire lease term.

—Even with respect to housing acquired through a “sale,” § 3604(b)’s guarantee of nondiscriminatory services and privileges should be read to apply in those post-acquisition settings where the “services” or “privileges” at issue are part and parcel of the rights obtained in buying the relevant property (e.g., access to membership in a local swim club or to the common areas of a condominium or other type of housing with communal rights).

—These conclusions as to § 3604(b)’s applicability to post-acquisition discrimination hold true regardless of whether that provision’s “therewith” clause—which controls the “services” part of § 3604(b)—is read to apply to “a dwelling” or only to “the sale or rental of a dwelling,” neither of which reading is mandated by the common meaning of “therewith” or the grammatically correct construction of § 3604(b). Thus, even if this “services”-controlling clause is thought to target “the sale or rental of a dwelling,” it would still support post-acquisition “services” claims in all “rental” cases and in some “sale” situations as well.

These conclusions undercut the rationales put forth by the Seventh Circuit in *Halprin* and by the Fifth Circuit in *Cox* to justify their view that § 3604 does not cover post-acquisition discrimination. These conclusions also mean that HUD’s regulation interpreting § 3604(b) to cover services and facilities “associated with a dwelling”<sup>350</sup> is a defensible reading of this provision in all “rental” and in some “sale” cases. This, in turn, means that HUD’s regulation applying § 3617 to interference claims by current residents is correct in all such cases, even if, as *Halprin* suggested, § 3617 must be tied to a predicate violation of §§ 3603-3606.

Despite all this, the question remains whether *Cox*’s holding that the practices challenged there are outside the scope of § 3604(b) was nevertheless justified because such practices are neither “services” nor “privileges” covered by this provision in a “sales” case. This question is addressed next in Part IV.

#### IV. A BETTER APPROACH TO MUNICIPAL SERVICES CASES

##### A. *What Do Post-Sale “Services” and “Privileges” Cover?*

Part III demonstrated that the FHA’s § 3604(b) covers housing-related

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350. *See supra* text accompanying note 217.

“services” and “privileges” even—contrary to *Cox*’s view—in some post-acquisition “sale” situations where current homeowners are challenging the defendant’s discrimination. This coverage would protect current homeowners to the extent that the rights they obtained in purchasing their homes included “services” or “privileges” that are part and parcel of those property rights, such as the right to use a condominium’s common areas.

Parenthetically, it might be argued that such sale-based privileges under § 3604(b) were intended to be co-extensive with the protections provided by § 1982’s right to “purchase [and] hold . . . real . . . property.”<sup>351</sup> The argument would be based on the fact that Congress, in passing the FHA, was fully aware of § 1982’s possible application to housing discrimination<sup>352</sup> and on the Supreme Court’s indication shortly thereafter in *Sullivan* and *Tillman* that § 1982 protects current residents against race-based discrimination in ways similar to what was intended by § 3604(b).<sup>353</sup> Whether § 3604(b)’s coverage in “sale” situations is exactly equal to § 1982’s may be debated, but certainly some similarity seems appropriate. In this regard, it is worth noting that the Supreme Court’s decision in *City of Memphis* thereafter placed some limits on situations where black homeowners could invoke § 1982 to challenge allegedly discriminatory municipal actions, although the Court did opine there that discrimination in municipal services is actionable under § 1982.<sup>354</sup> In any event and regardless of its connection to § 1982, § 3604(b)’s sale-based coverage would seem clearly to extend at least to those services and privileges that are tied to homeowners’ property-based rights.

To determine the extent of such rights, it is worth recalling here the D.C. Circuit’s 1991 opinion in *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*<sup>355</sup> There, the court ruled against an apartment owner who alleged that the defendant violated the FHA by refusing to provide elevator service based on the

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351. 42 U.S.C. § 1982 (2000).

352. The Congress that enacted the 1968 FHA was aware of the pending § 1982 litigation in what was to become *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968). *See, e.g., 1967 Banking Hearings, supra* note 257, at 163 (response to Sen. Mondale’s question by Louis H. Pollak, Dean of Yale Law School).

353. *See supra* text accompanying notes 333-39 (discussing *Sullivan*) and notes 347-49 (discussing *Tillman*). The Court recently cited *Sullivan* in a far less analogous civil rights case for the proposition that ““it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].”” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (alteration in original) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)). Although the 1968 Congress was not aware of *Sullivan*, it was aware of other § 1982-based litigation pending at the time of the FHA’s enactment. *See supra* note 352.

354. *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981); *see also supra* notes 134-47 and accompanying text.

355. 929 F.2d 714 (D.C. Cir. 1991). The *Clifton Terrace* case is further described *supra* in notes 231, 234, and text accompanying *supra* note 240.

race of the owner's tenants.<sup>356</sup> While holding that neither § 3604(a) nor § 3604(b) covered this situation, the D.C. Circuit did suggest that § 3604(a) would cover "the denial of certain essential services relating to a dwelling, such as . . . sewer hookups, zoning approval, or basic utilities" if they "result in the denial of housing."<sup>357</sup> As for § 3604(b), *Clifton Terrace* opined that this provision, unlike § 3604(a), goes beyond housing denials to address "habitability" issues, at least with respect to "services and facilities provided in connection with the sale or rental of housing."<sup>358</sup>

It was thus clear to the *Clifton Terrace* court that § 3604(b) is "directed at those who provide housing and then discriminate in the provision of attendant services or facilities, or *those who otherwise control the provision of housing services or facilities*."<sup>359</sup> The court noted that, in rental situations, this understanding would be consistent with HUD's regulation outlawing discriminatory maintenance and services.<sup>360</sup> As for post-acquisition "sales" situations, *Clifton Terrace* viewed § 3604(b)'s application to such services as "not so clear."<sup>361</sup> The court noted that, while the Fourth Circuit in *Mackey* and the Seventh Circuit in *Southend* had opined that § 3604(b) covered discriminatory municipal services, "[t]he fact that such a discriminatory practice could have an impact on the use and enjoyment of residential property rights . . . does not necessarily mean that it will also be redressable under [the FHA]."<sup>362</sup> The D.C. Circuit then avoided deciding this question, noting that the defendant before it—a private service contractor that was not the "sole source" of elevator services in the area—was distinguishable from a municipal service provider.<sup>363</sup> As to the latter, the *Clifton Terrace* opinion noted:

Like public utilities, municipalities often are the sole source of a service essential to the habitability of a dwelling. In the case of such an absolute monopoly, ultimate control over the service in question resides with the municipality or utility rather than with the provider of housing, and such a "sole source" could conceivably violate the [§ 3604(b)] rights of tenants without any intermediate action by the landlord.<sup>364</sup>

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356. *Clifton Terrace Assocs., Ltd.*, 929 F.2d at 723.

357. *Id.* at 719-20.

358. *Id.* at 720 (citing 42 U.S.C. § 3604(b), (f)(2) (1988)).

359. *Id.* (emphasis added).

360. *Id.* (citing 24 C.F.R. § 100.65 (1990)).

361. *Id.*

362. *Id.* (citing *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D. Pa. 1978)).

363. *Id.*

364. *Id.* In her concurrence, Judge Henderson chose not to endorse this "sole source" theory of liability, finding it unnecessary to deciding the case. *Id.* at 724 (Henderson, J., concurring). She did agree with the majority, however, that § 3604(b)'s intended targets were "those who provide housing and then discriminate in the provision of attendant services or facilities, or those who otherwise control the provision of housing services or facilities." *Id.* (quoting *id.* at 720 (majority opinion)).

Although this part of *Clifton Terrace* is entirely dicta, it does provide a useful theory for distinguishing between those services and privileges that are covered by § 3604(b) in “sales” situation and those that are not. The former would include—in addition to those offered by housing providers that are “attendant” to the sale—those provided by others who “control the provision of housing services and facilities” because only they can generate such services and facilities.<sup>365</sup>

On the other hand, § 3604(b) would not extend to every type of discrimination that could conceivably impact on post-acquisition owners’ use or enjoyment of their homes. Although one post-*Halprin* opinion has suggested such a position by arguing that “it is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein,”<sup>366</sup> the suggestion implicit in this statement seems too broad, at least in “sale” situations. In these situations—unlike rentals—§ 3604(b)’s “privileges” should be tied to some ownership-based right and thus would not extend to every conceivable post-acquisition type of discrimination that might have a negative impact on the enjoyment of one’s home.

While such an interpretation of post-sale “services” and “privileges” would thus be somewhat limited, the reach of § 3604(b) would be far from trivial. Among other things, it would extend the FHA to ownership-based services and privileges due to residents in condominiums and other similar community-owned housing, which is becoming an increasingly important part of the American housing market.<sup>367</sup> It would also reinforce the view of those courts that have opined that § 3604(b) guarantees nondiscrimination in police and fire protection and garbage collection, at least to the extent that such services are provided to all local homeowners based on their ownership of property in the area.<sup>368</sup> How it would apply in other municipal services cases, like *Cox*, is explored in the next section.

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365. See *id.* at 720 (majority opinion).

366. United States v. Koch, 352 F. Supp. 2d 970, 976 (D. Neb. 2004). This case is further described *supra* note 321. This comment was made after the court in *Koch* noted that the *Halprin* opinion, itself, had observed that “as a purely semantic matter,” § 3604(b)’s “privileges of sale or rental” might conceivably be thought to include the privilege of inhabiting the premises.” *Id.* at 976 (quoting *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004)).

367. See, e.g., ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT xiii (2005) (describing the tremendous growth since the 1960s in various types of community-based homeownership and noting that “[b]y 2004, 18 percent—about 52 million Americans—lived in housing within a homeowners association, a condominium, or a cooperative” and “since 1970 about one-third of all new housing units in the United States have been built within a private community association”).

368. See municipal services cases cited *supra* note 234.

### *B. Application to Cox and Other Modern Municipal Services Cases*

*Cox*, itself, is tricky. For one thing, the Fifth Circuit's opinion—being based on the perceived inapplicability of § 3604(b) to post-acquisition cases—sidestepped the key issue of *which* post-sale situations might be covered by “assuming that the enforcement of zoning laws alleged here is a ‘service’” under § 3604(b).<sup>369</sup> *Cox* also seemed to accept those decisions holding that “general police and fire protection are within the scope of § 3604(b)” on the ground that such protection might “conceivably” be connected “to the ‘sale or rental of a dwelling.’”<sup>370</sup>

Still, the *Cox* opinion was clearly troubled by the implications of giving too broad a reading to “services” in § 3604(b), fearing that “unmooring the ‘services’ language from the ‘sale or rental’ language pushe[d] the FHA into a general anti-discrimination pose, creating rights for any discriminatory act which impacts property values—say, for generally inadequate police protection in a certain area.”<sup>371</sup> Of course, such a right already exists by way of an equal protection claim under § 1983, as the *Cox* case itself shows.<sup>372</sup> Judge Higginbotham’s opinion observed, however, that the FHA, unlike § 1983, “does not require a governmental policy or custom, and does not require proof of both discriminatory impact and intent.”<sup>373</sup>

This meant, according to *Cox*, that the FHA was intended to operate only “in the housing field and remains a housing statute.”<sup>374</sup> Because the FHA “targets only housing,” its “services” provision is limited to those services that are connected to housing sales or rentals, leading the Fifth Circuit to conclude that the *Cox* plaintiffs’ complaint that “the value or ‘habitability’ of their houses has decreased” as a result of the defendants’ alleged discrimination was not covered

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369. *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005). The *Cox* opinion, after noting language in *Southend*, *Clifton Terrace*, and other appellate decisions offering conflicting views on this matter, ultimately chose “not [to] decide this issue.” *Id.* at 745 n.34.

370. *Id.* at 745-46 n.36 (citing *Southend Neighborhood Improvement Ass’n v. St. Clair County*, 743 F.2d 1207, 1210 (7th Cir. 1984)).

371. *Id.* at 746.

372. See *supra* text accompanying notes 59 and 103-04. Part II.A.1 describes municipal services claims based on § 1983 and the Equal Protection Clause.

373. *Cox*, 430 F.3d at 746. The requirement that a § 1983 action against a local government be based on the defendant’s “policy or custom” was established in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

In *Cox*, Judge Higginbotham also held that the plaintiffs’ § 1981 claim, like their § 1983 claim, required such a showing of “governmental policy or custom.” See *Cox*, 430 F.3d at 746, 748. This view is supported by *Jett v. Dallas Independent School District*, where the Supreme Court held that a plaintiff asserting a § 1981 claim for damages against a governmental entity must show that the violation of his § 1981 rights “was caused by a custom or policy within the meaning of *Monell* and subsequent cases.” 491 U.S. 701, 735-36 (1989).

374. *Cox*, 430 F.3d at 746.

by § 3604(b).<sup>375</sup> Post-acquisition owners or tenants can only invoke § 3604(b), according to *Cox*, if they allege that the defendant's discrimination amounts to "actual or constructive eviction" from their homes.<sup>376</sup>

This part of the *Cox* opinion is open to a variety of criticisms. For one thing, it is not at all clear that an FHA-based claim of discriminatory municipal services would not be subject to the same "policy or custom" requirement as one brought under § 1983. Although the FHA does not explicitly include such a requirement, neither does § 1983; the requirement derives, in the latter case, from judicial interpretation of Congress's intent with respect to § 1983.<sup>377</sup> In similar situations, courts have seen fit to interpret the FHA in line with § 1983 precedents—for example, in extending § 1983 immunities to individual officials sued for money damages under the FHA<sup>378</sup>—perhaps because both statutes are considered to have been enacted against the background of, and thereby to have incorporated, traditional tort-law concepts.<sup>379</sup>

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375. *Id.*

376. *Id.* Here, the *Cox* opinion cited a Fifth Circuit decision, *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982), which *Cox* described as upholding a § 3604(b) claim by a tenant who was forced to vacate his apartment for entertaining black guests in violation of the landlord's "whites-only" policy. *Cox*, 430 F.3d at 746. According to *Cox*, "[t]his was akin to constructive conviction [sic] and was a clear discriminatory condition of 'a sale or rental of a dwelling.'" *Id.* at 747.

*Cox*'s reading of *Woods-Drake* is far too narrow. If actual or constructive eviction were all that was involved in *Woods-Drake*, the plaintiff there could have relied on § 3604(a)'s "otherwise make unavailable" provision, as both *Cox* and *Halprin* had already recognized. *See Cox*, 430 F.3d at 742 & n.20 (quoted *supra* text accompanying note 96); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004) (quoted *supra* text accompanying note 67). The § 3604(b) claim in *Woods-Drake* was based on the landlord's mere *threat* of eviction for the plaintiff's having entertained black guests. 667 F.2d at 1200. In this situation (i.e., threats and harassment that fall short of actual or constructive eviction), the availability of § 3604(b) apart from § 3604(a) is crucial and has regularly been relied on by courts, including the Fifth Circuit in *Woods-Drake*. *See id.* at 1201; *United States v. Lepore*, 816 F. Supp. 1011, 1024 (M.D. Pa. 1991) (holding that discriminatory eviction violates § 3604(a), while discriminatory attempted eviction violates § 3604(b)); other cases cited at SCHWEMM, *supra* note 13, § 14:3 n.30. Thus, *Woods-Drake* and these other cases stand for the proposition that § 3604(b) may be invoked in post-acquisition situations to complain of discrimination that interferes with a tenant's "privileges of . . . rental," even when this discrimination does not result in the plaintiff's actual or constructive eviction.

377. *See, e.g.*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

378. *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 12B:5 n.19.

379. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285-91 (2003) (interpreting the FHA); *Wood v. Strickland*, 420 U.S. 308, 316-18 (1975) (interpreting § 1983). *But see People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733-34 (E.D. Va. 1992) (holding that, unlike under § 1983, a city may be held liable based on "respondeat superior" principles for its employees' FHA violations).

As *People Helpers* indicates, Judge Higginbotham may be right that FHA claims against local governments do not include a "policy or custom" requirement. In § 1983 cases, this requirement was adopted by the Supreme Court as a way of avoiding the imposition of "respondeat superior"

*Cox*'s other reason for not allowing the FHA to be used to remedy discriminatory municipal services—that an FHA claim, unlike one under the Equal Protection Clause, could be based on discriminatory impact as well as discriminatory intent<sup>380</sup>—is also not very persuasive. While the FHA does cover impact-based claims,<sup>381</sup> the claim in *Cox* was based on discriminatory intent,<sup>382</sup> and this has been true for virtually all other modern claims of discriminatory municipal services.<sup>383</sup> While an impact-based claim is certainly conceivable—such a claim was made in the early *Hawkins* case discussed in Part II.A.1<sup>384</sup>—intent-based discrimination has been the basis for all modern municipal services claims brought under the FHA.

Furthermore, the intent and “custom or policy” requirements are related, at least as a practical matter. It will be recalled that in *Cox*, the trial court ruled against the plaintiffs’ § 1983 claim because they failed to prove an official “policy or custom” and ruled against their § 1981 claim because they proved only the City’s “gross negligence” rather than its “intent to discriminate against them on the basis of race.”<sup>385</sup> The Fifth Circuit upheld the lower court’s determination that the City’s actions “amounted to ‘negligence,’ not a custom” and thus affirmed its judgment on both the § 1981 and § 1983 claims as “sound in law and fact.”<sup>386</sup> On the other hand, if municipal officials were found to have intentionally discriminated against a black neighborhood in the provision of services, it seems likely that such action would usually be found also to reflect the municipality’s “policy or custom.” As Judge Higginbotham recognized in *Cox*, the concept of a municipality’s “policy or custom” covers more than its

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liability on municipal defendants for the federal-law violations of their employees. *See Monell*, 436 U.S. at 690-95. In contrast, the Court has endorsed such vicarious liability under the FHA, at least for private defendants. *See Meyer*, 537 U.S. at 285-86. However, vicarious liability was also thought proper in cases brought under the 1866 Civil Rights Act until the Court refused to extend this understanding to § 1981 actions against municipalities, determining that § 1983 principles should govern such actions. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-36 (1989) (noting that the Court had previously upheld damage claims based on vicarious liability “[i]n the context of the application of § 1981 and § 1982 to private actors,” but that this did not preclude limiting such claims against municipal defendants to “custom or policy” situations). In short, until the possibility of a *Jett*-type interpretation of the FHA has been authoritatively ruled out, Judge Higginbotham’s assumption in *Cox* that FHA claims against municipalities may succeed without a § 1983-like showing of “policy or custom,” *Cox*, 430 F.3d at 746, is not justified.

380. *Cox*, 430 F.3d at 746.

381. *See* cases cited in SCHWEMM, *supra* note 13, § 10:4 nn.18-34, 41-42.

382. *See Cox*, 430 F.3d at 736-38.

383. *See, e.g.*, cases cited *supra* notes 124, 151, and 234.

384. *See supra* text accompanying notes 120-21; *see also infra* notes 408-11 and accompanying text.

385. *Cox v. City of Dallas*, No. Civ.A.3:98-CV-1763BH, 2004 WL 2108253, at \*16 (N.D. Tex. Sept. 22, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005); *see also supra* text accompanying note 60.

386. *Cox*, 430 F.3d at 749.

written policies, ordinances, and regulations;<sup>387</sup> it extends as well to a “particular course of action [that] is properly made by that government’s authorized decisionmakers.”<sup>388</sup> Thus, if the municipal officials responsible for providing a particular service (e.g., garbage collection) do so by intentionally discriminating against a minority neighborhood, their actions may well establish a “custom or policy” sufficient to justify municipal liability under § 1983.<sup>389</sup> Of course, not every incident involving a municipal employee’s intentional discrimination would satisfy the “custom or policy” requirement,<sup>390</sup> but those involving an ongoing pattern or practice of discriminatory municipal services generally would.<sup>391</sup>

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387. *Id.*

388. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *see also Cox*, 430 F.3d at 748 (noting that “official policy” includes “a persistent, widespread practice of officials or employees . . . [that] is so common and well settled as to constitute a custom that fairly represents the municipality’s policy”).

389. *See, e.g., Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985) (noting in § 1983 case that “‘policy’ generally implies a course of action consciously chosen from among various alternatives”); *see also Pembaur*, 475 U.S. at 483 (“[M]unicipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.”) (plurality opinion).

390. Judge Higginbotham’s opinion in *Cox* described a scenario in which intentional discrimination might not reflect a municipality’s “policy or custom,” i.e., where those who are engaged in the intentional discrimination are not municipal policymakers and the policymakers did not have “actual or constructive knowledge of this practice . . . at the time it occurred.” *Cox*, 430 F.3d at 749 (quoting *Cox*, 2004 WL 2108253, at \*10). Thus, for example, if municipal employees, because of racial animus, refused to pick up garbage in black neighborhoods while providing better service in white neighborhoods, but this practice was not known to city policymakers, no “policy or custom”—and thus no governmental liability under § 1983—would be established. While this scenario is theoretically possible, *see, e.g., East-Miller v. Lake County Highway Dep’t*, 421 F.3d 558 (7th Cir. 2005) (dealing with minority homeowner’s claim under the FHA’s § 3617 that county highway crews had damaged her mailbox while plowing snow based on racial animus), such an example seems unlikely to produce the kind of municipal services litigation discussed in this Article, simply because the residents of the disfavored minority neighborhood, as they did in *Cox*, would generally seek relief informally by complaining to the relevant municipal policymakers before filing their lawsuit.

391. In addition to *Cox*, a number of other § 1983-based claims of discriminatory municipal services have noted that the municipality’s liability requires a showing of “policy or custom.” *See, e.g., Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*11 (N.D. Tex. Sept. 9, 2004); *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*1-2 (N.D. Tex. Feb. 14, 2002); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1141 (N.D. Ill. 1993). Few, if any, of these cases, however, have held that the plaintiffs’ § 1983 claim failed where plaintiffs were able to allege or prove intentional race discrimination. *See, e.g., Miller*, 2002 WL 230834, at \*2; *cf. New W., L.P. v. City of Joliet*, 491 F.3d 717, 720 (7th Cir. 2007) (noting that, for purposes of satisfying *Monell*’s “policy or custom” requirement, “there can be no doubt that § 1983 is available” here based on the fact that the defendant-municipality’s “filing condemnation and

Furthermore, in such cases, even were the municipality itself able to escape liability because no “custom or policy” is shown, its responsible officials could still be held liable under § 1983 for injunctive relief and perhaps money damages,<sup>392</sup> which, as shown by *Hawkins* and other early discriminatory municipal services claims based on § 1983, might provide a sufficient remedy in such cases.<sup>393</sup>

The point is that, in the vast majority of FHA-based municipal services claims (i.e., those alleging intentional discrimination), relief would also be available under § 1983 and the 1866 Civil Rights Act. Thus, Judge Higginbotham’s fear in *Cox* of the dire consequences of applying the FHA to municipal services cases seems exaggerated. Indeed, the very way that *Cox* expressed this fear—that the FHA could become “a general anti-discrimination [law] . . . —say, for *generally inadequate police protection in a certain area*”<sup>394</sup>—misses the point of what the *Cox* plaintiffs were complaining about. Their claim was not based on “inadequate” municipal services in the plaintiffs’ neighborhood, but on the fact that such services were being provided in a *discriminatory* way vis-a-vis the provision of those services in comparable white neighborhoods.<sup>395</sup> If, for example, a municipality could not afford to provide adequate police protection in *all* neighborhoods—or even just in *all poor* neighborhoods—but its inadequate protection was provided without regard to the racial make-up of these areas, then neither § 3604(b) nor any other civil rights statute would be violated. All that the *Cox* plaintiffs were advocating was that § 3604(b) be interpreted to reach as far as § 1983 and the 1866 Act had for decades.<sup>396</sup>

Another reason to discount *Cox*’s fear that the FHA might be used as a general remedy for all sorts of discriminatory municipal services is that, as the applicable HUD regulation provides, § 3604(b) only covers “services” and

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nuisance suits is action by the City itself, as are statements made . . . by the Mayor”).

392. As for injunctive relief, see, e.g., *Will v. Michigan Department of State Police*, 491 U.S. 66, 71 n.10 (1989) (noting, in case holding that states may not be sued under § 1983, that state officials may still be sued in their official capacity for injunctive relief). As for money damage awards against officials sued in their individual capacities, see, e.g., *Jett v. Dallas Independent School District*, 491 U.S. 701, 707-08 (1989) (discussing plaintiff’s § 1981 and § 1983 claims against defendant Todd); *Wood v. Strickland*, 420 U.S. 308, 314-22 (1975) (holding that § 1983 compensatory awards may be assessed against school board members and other officials with “qualified immunity” unless their deprivation of plaintiff’s constitutional rights was done in good faith).

393. See cases cited *supra* notes 109 and 124, all of which were discriminatory municipal services cases decided in the plaintiffs’ favor and brought solely against the responsible individual officials because, at the time, the Supreme Court had yet to permit § 1983 claims against a municipality itself.

394. *Cox*, 430 F.3d at 746 (emphasis added).

395. *Id.* at 747.

396. See, as to § 1983, *supra* note 124 and accompanying text and, as to the 1866 Act, *supra* note 146, note 151 and accompanying text, and note 171.

“privileges” that are “associated with a dwelling.”<sup>397</sup> Thus, a “services” claim in post-acquisition situations should be recognized for, but limited to, those services that are literally to be performed at a homeowner’s residence, such as discriminatory garbage collection and fire protection. Such an interpretation of § 3604(b) would also cover discrimination in municipal-supplied water and sewer service, as two recent cases in Ohio and Georgia alleged.<sup>398</sup> Police protection and road maintenance would probably also be covered, as these services, while not always directed at specific houses, are often provided in the vicinity of such houses.<sup>399</sup> By contrast, all other types of municipal services (e.g., public schools), while no doubt having an effect on the value of local residents’ housing, would not be covered by § 3604(b), because they are not directed at such housing and therefore would not be considered “associated with a dwelling.”

As for a “privileges of sale” claim under § 3604(b), these should be limited to those rights that are considered “part and parcel” of the property rights

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397. See *supra* note 217 and accompanying text (discussing 42 C.F.R. § 100.65(b)(4) (2007)).

398. See *Steele v. City of Port Wentworth*, Civ. A. No. CV405-135, 2008 WL 717813 (S.D. Ga. Mar. 17, 2008); *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 463 (S.D. Ohio 2007).

In the *Zanesville* case, scores of individuals and two organizations sued a city, county, township, and certain officials, claiming that the defendants had “a policy, pattern, and practice of denying public water service to the individual [p]laintiffs during the last fifty years because they are African-American and/or because they reside in a predominantly African-American neighborhood.” *Zanesville*, 505 F. Supp. 2d at 463. These discriminatory actions were alleged to violate the FHA’s § 3604(a) and § 3604(b), the 1866 Civil Rights Act, Title VI, and § 1983, as well as certain state laws. *Id.* at 492-93 n.21. The defendants moved for summary judgment on a variety of grounds, including lack of standing, tardiness, inadequate evidence of discrimination, and inappropriate claims for relief, but not, apparently, on the merits of whether the FHA outlawed their alleged behavior. *See id.* at 483. The district court granted parts of this motion (including holding moot the plaintiffs’ claim for injunctive relief because water service had been extended to their neighborhood by January 2004), but it denied other parts and in particular upheld the plaintiffs’ compensatory damage claims against the City and County defendants under all of the cited federal laws. *Id.* at 483-501.

In the *Port Wentworth* case, residents of two black neighborhoods accused their city of an ongoing practice of intentional racial discrimination by providing them inferior water, sewer, and other municipal services to those accorded comparable white neighborhoods. *Port Wentworth*, 2008 WL 717813, at \*1-10. The complaint was filed in 2005 and cited discriminatory acts dating back to the 1980s. *Id.* The defendant moved for summary judgment, arguing, *inter alia*, that the plaintiffs’ claims were not timely and that the FHA did not cover this situation. *See id.* at \*10. On March 17, 2008, the district court granted this motion, dismissing plaintiffs’ § 3604(b) claim on the basis of *Cox* and rejecting their § 1982 and § 1983 (equal protection) claims in part on statute-of-limitations grounds and in part because of insufficient proof of discrimination. *Id.* at \*11-20.

399. See, e.g., *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 254 F. Supp. 2d 486, 499, 502-03 (D.N.J. 2003) (opining that § 3604(b) would cover governmental units that provide “specific residential services” including those “responsible for door-to-door ministrations such as . . . police departments [and] fire departments”).

obtained in purchasing one's home. As discussed above in Part III.C, these would include use of the common areas in condominiums and other community-owned types of dwellings,<sup>400</sup> and, to the extent a local government ties access to other rights or services to property ownership (e.g., the use of recreational areas or city dumps), discrimination here would also be outlawed by § 3604(b). If ownership of a home includes the right to send one's children to local public schools, then discriminatory denial of access to these schools would also be actionable under § 3604(b). A right to nondiscriminatory *access*, however, would not include a claim based on the *inadequacy* of local schools, any more than it would under the Equal Protection Clause.<sup>401</sup>

In applying these principles to the plaintiffs' claims in *Cox*, the issue would become the one assumed away by the Fifth Circuit: that is, whether the defendant's enforcement of its zoning law was a "service" or "privilege" under § 3604(b). The answer would clearly be "yes" if the targets of such zoning enforcement were the plaintiffs' own homes, as is demonstrated by recent cases alleging discriminatory enforcement against Hispanics of land-use restrictions, building codes, and other municipal laws.<sup>402</sup> However, the *Cox* plaintiffs, like

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400. See *supra* notes 347-49 and accompanying text.

401. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973) (holding that providing inferior schools based on the wealth of the neighborhood does not violate the Equal Protection Clause).

402. See, e.g., *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 678, 682-85 (D.C. Cir. 2006) (described *supra* notes 233-34); *Hispanics United of DuPage County v. Vill. of Addison*, 988 F. Supp. 1130, 1171 (N.D. Ill. 1997) (approving settlement in class action by Hispanic residents who alleged that their village's program of acquiring and demolishing housing in plaintiffs' neighborhoods had a disparate impact and was based on intentional discrimination against Hispanics); Nick Miroff, *Culpepper Officials Targeting Illegal Immigrants: Enforcement of Zoning Rules on Hearing Limits Is Town Council's Final Step*, WASH. POST, Sept. 21, 2006, at T10 (reporting on alleged FHA violations resulting from City's actions directed against non-U.S. citizens); Nick Miroff, *Manassas Official Irked by Pace of Housing Inquiry: HUD Looks at Crowding Policy*, WASH. POST, Oct. 5, 2006, at PW01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100400069.html> (reporting on HUD investigation of alleged FHA violations by City's discriminatory enforcement of its "anti-crowding" ordinances against Hispanic families); Press Release, U.S. Dep't of Justice, *Illinois City Will Pay \$200,000 in Damages and Fines to Settle Housing Discrimination Suit* (May 20, 1997), available at <http://www.usdoj.gov/opa/pr/1997/May97/208cr.htm> (describing settlement of FHA case alleging that the City of Waukegan, Illinois, enacted a housing code to limit the number of Hispanic family members living together); see also *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007), *appeal pending* (3d Cir. 2008) (enjoining as unconstitutional defendant-City's ordinances barring local landlords from renting to non-U.S. citizens, which allegedly had a disparate impact on Hispanics); *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (same); cf. *New W., L.P. v. City of Joliet*, 491 F.3d 717, 720-22 (7th Cir. 2007) (reversing dismissal of claim by apartment owner that City attempted to condemn its property and otherwise harassed it in violation of the FHA and § 1982 because of the race of its tenants); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 722, 733 (E.D. Va. 1992)

those in *Southend* and a number of other cases that have rejected § 3604(b) claims by local residents,<sup>403</sup> were complaining of the defendants' enforcement actions directed at other properties. In such a case, a "services" claim under § 3604(b) would be unavailing. As for a "privileges" claim, neighboring homeowners presumably have a right of *access* to complain to local zoning enforcement officials, but their homeowner-status would generally not give them the right to insist that these officials act in a particular way. In other words, a "privilege of sale" claim could also have been rejected in *Cox* based on a correct understanding of § 3604(b).

This analysis, then, suggests that the Fifth Circuit was justified in denying relief under the FHA in *Cox*. This is not to belittle the injuries suffered by the homeowner-plaintiffs there. Clearly, those injuries were serious; among other things, as the Fifth Circuit recognized, the *Cox* plaintiffs alleged that "the value or 'habitability' of their houses has decreased" as a result of the defendants' alleged discrimination.<sup>404</sup> This, however, merely gave the plaintiffs standing to sue. It did not establish that their injuries were the result of an FHA violation. As to this point, the *Cox* plaintiffs may well have been trying to stretch § 3604(b) beyond its proper scope.

### C. Why Does FHA Coverage Matter?

As the *Cox* litigation demonstrates, residents in minority neighborhoods who complain of discriminatory municipal services may proceed under the 1866 Civil Rights Act, § 1983 (to enforce an equal protection claim), and perhaps other federal laws, regardless of whether they have a claim under the FHA. This raises the question whether FHA coverage of this type of case is of any practical significance. It may be, but most of the reasons deal with procedures and relief rather than substance.

As for substance, Judge Higginbotham's opinion in *Cox* noted two differences between an FHA-based claim and those based on other federal civil rights laws: (1) the FHA includes an impact, as well as an intent, standard; and (2) municipal liability may be established under the FHA without a showing of governmental "policy or practice" as is required in § 1983 claims.<sup>405</sup> Earlier, I discounted the practical value of these differences, noting that discriminatory municipal services cases tend to be intent-based claims and that § 1983 concepts may be incorporated into FHA doctrine in such cases.<sup>406</sup>

As for the intent requirement, § 1982, an equal protection claim under §

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(upholding § 3617 claim based on municipality's discriminatory investigation of plaintiffs' group home for people with disabilities that was allegedly designed to shut down this home).

403. See *supra* note 174 and accompanying text (*Southend*); see also *supra* notes 237-39 and accompanying text (other cases).

404. *Cox v. City of Dallas*, 430 F.3d 734, 741 (5th Cir. 2005).

405. *Id.* at 746.

406. See *supra* text accompanying notes 377-93.

1983, and a private claim under Title VI all do require such a showing,<sup>407</sup> which means that, to the extent an impact-only claim of discriminatory municipal services is made, the FHA would be uniquely valuable. Still, such a claim seems unlikely to occur very often.<sup>408</sup> It would require that the defendant-municipality's inferior services to a black neighborhood result from a neutral policy that, albeit having a disproportionate impact on minorities, is being applied in a nondiscriminatory way.<sup>409</sup> Except for the defendants' assertion in *Hawkins* that they needed to upgrade services in poorer neighborhoods on a delayed basis because of fiscal constraints,<sup>410</sup> it is hard to imagine such a neutral policy and therefore hard to imagine an impact-only claim of discriminatory municipal services.

Apart from these issues, the arguments I have made for FHA coverage of discriminatory municipal services have gone no farther than what would be substantively outlawed by § 1982 and § 1983.<sup>411</sup> Therefore, the primary value of FHA coverage would be in those cases where the FHA's procedures or relief are more favorable than § 1982's and § 1983's. One possible difference here is that

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407. *See supra* notes 148-50 and accompanying text (§ 1982); *supra* notes 122-23 and accompanying text (equal protection claims under § 1983); *supra* note 155 and accompanying text (Title VI).

408. *See, e.g.*, *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994) (noting that there is "no substantial difference between these [§ 1982 and § 1983] claims and the Fair Housing Act claim[] . . . , except that plaintiffs who make claims under § 1982, and under § 1983 based on equal protection, have been required to allege that some intentional discrimination took place. Because the plaintiffs do allege that the County intentionally discriminated against them, the complaint adequately states both claims.") (citation omitted); *cf. Good Shepherd Manor Found. v. City of Momence*, 323 F.3d 557, 565 (7th Cir. 2003) (suggesting that City's cut-off of water supply to group home for disabled persons would violate the FHA if it were motivated by "discriminatory intent," but that such a claim could not be based on discriminatory impact).

409. *See SCHWEMM*, *supra* note 13, § 10:6 nn.1-3 and accompanying text.

410. *See Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1168-69 (N.D. Miss. 1969), *rev'd*, 461 F.2d 1171 (5th Cir. 1972).

411. Even if FHA coverage only goes as far as § 1982 and § 1983, one advantage of such coverage would be the availability of the FHA's § 3617, *see* 42 U.S.C. § 3617 (2000), which outlaws, *inter alia*, retaliation against those who have exercised their § 3604 rights. *Compare SCHWEMM*, *supra* note 13, § 20:5 n.2 and accompanying text (describing § 3617 retaliation claims) *with CBOCS W., Inc. v. Humphries*, 128 S. Ct. 30 (2007) (granting certiorari to determine whether retaliation claims may be brought under the 1866 Civil Rights Act).

The FHA's § 3617 also bans interference with current residents and others who have exercised their § 3604 rights, *see SCHWEMM*, *supra* note 13, § 20:1 nn.5-6 and accompanying text, but, given the text's conclusion that § 3604 itself covers discriminatory municipal services claims by such residents, the additional value of § 3617 in these cases—other than to protect against retaliation—would seem to be marginal. *See, e.g.*, *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1144 (N.D. Ill. 1993) (upholding black homeowners' § 3617 claim of discrimination in the provision of police protection as a result of having held that such discrimination violates § 3604(b)).

standing to sue is broader under the FHA, extending not only to the direct victims of a defendant's discrimination (e.g., local homeowners in a discriminatory municipal services case), but also to all others injured by such discrimination, including fair housing organizations and other advocacy groups.<sup>412</sup> Furthermore, the FHA, unlike § 1982 and § 1983, authorizes both HUD and the Justice Department to bring enforcement suits,<sup>413</sup> and both have been active in certain types of discriminatory municipal services cases.<sup>414</sup>

Another clear difference between the FHA versus § 1982 and § 1983 is that the former is subject to different statutes of limitations, with the FHA having a one-year limitations period for administrative complaints and a two-year period for private lawsuits,<sup>415</sup> while § 1982 and § 1983, being silent on this matter, are governed by the local state's most analogous limitations period.<sup>416</sup> This difference has proved important in some cases challenging discriminatory government services.<sup>417</sup> Furthermore, the "continuing violation theory" as a way

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412. *See, e.g.*, *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 476-77 (S.D. Ohio 2007) (noting, in a municipal services case, that the FHA claim was brought by organizational plaintiffs as well as homeowner-plaintiffs, whereas only the latter brought the § 1982, § 1983, and Title VI claims); *Reeves v. Carrollsburg Condo. Owners Ass'n*, No. Civ. A. 96-2495RMU, 1997 WL 187720, at \*2-5 (D.D.C. Dec. 18, 1997) (upholding fair housing organization's standing to bring FHA claim based on condominium association's toleration of race and sex harassment of condominium resident, but denying such standing under § 1981 and § 1982); *see also Jackson*, 21 F.3d at 1539-40 (upholding "neighborhood standing" under the FHA, but declining to address such standing under § 1982 and § 1983). *See generally Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979) (holding that FHA standing "extend[s] to the . . . limits of Art. III" and that anyone may sue who is "genuinely injured by conduct that violates *someone's . . . rights*" under the FHA).

413. *See* 42 U.S.C. § 3610(a)(1)(A)(i) (authorizing HUD to file FHA administrative complaints) and § 3614(a) (authorizing the Attorney General to file FHA "pattern or practice" actions).

414. *See, e.g.*, HUD and Justice cases cited *supra* note 402.

415. *See* 42 U.S.C. § 3610(a)(1)(A)(i) (addressing administrative complaints) and § 3613(a)(1)(A) (addressing civil lawsuits).

416. *See SCHWEMM*, *supra* note 13, § 27:21 n.7 and accompanying text (regarding § 1982) and § 28:10, nn.14-16 and accompanying text (regarding § 1983).

417. *See, e.g.*, *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187-88 (4th Cir. 1999) (dismissing as "time-barred" § 1983 claim under Maryland's three-year limitations period in a claim by black residents' challenging the siting of a new highway near their neighborhood); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 450-51 (E.D. Pa. 2006) (dismissing, in case alleging discriminatory municipal services, § 1983 claim as time barred, but dealing with claim based on FHA's § 3604(b) on the merits); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 956-58 (W.D. Tenn. 2003), *subsequent decision*, 103 F. App'x 560 (6th Cir. 2004) (dismissing as time barred § 1982 and § 1983 claims based on Tennessee's one-year limitations period, while upholding some FHA claims by black property owner who alleged that municipal officials denied water service to plaintiff's planned home because of his race); *cf. Franks v. Ross*, 313 F.3d 184, 188 n.1, 194-96 (4th Cir. 2002) (upholding § 1982 and equal protection

for plaintiffs to extend the limitations period—which may often be important in cases involving discriminatory municipal services<sup>418</sup>—is well-established under the FHA,<sup>419</sup> but has a mixed record in such cases based on § 1982 and § 1983.<sup>420</sup> Another statute-of-limitations advantage of the FHA is that FHA actions brought by the Justice Department seeking injunctive relief are not subject to any time limits.<sup>421</sup>

Finally, while the same relief is generally available in FHA and § 1982 cases (i.e., injunctive relief, actual and punitive damages, and attorney's fees awards),<sup>422</sup> there may be two differences, both of which deal with limits on damage awards that may be assessed against municipalities and their officials. The problem derives from the fact that in § 1983-based cases against such defendants, individual officials have been accorded qualified (“good faith”)<sup>423</sup> immunity from damage awards,<sup>424</sup> and municipalities are not subject to punitive damages.<sup>425</sup> It is unclear whether either or both of these limits applies to § 1982

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claims based on North Carolina's three-year limitations period in case where residents of black town claimed County was siting undesirable landfill near them based on race and where plaintiffs' FHA claim had been dismissed).

418. *See, e.g.*, cases described *supra* notes 398, 417.

419. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982). In the 1988 FHAA, Congress endorsed the “continuing violation theory.” *See* 42 U.S.C. § 3610(a)(1)(A)(i), § 3613(a)(1)(A); SCHWEMM, *supra* note 13, § 25:2 nn.22-23 and accompanying text.

420. *Compare Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 488-92 (S.D. Ohio 2007) (upholding, based on continuing violation theory, timeliness of claims based on § 1982 and § 1983 as well as those based on the FHA), *with Middlebrook*, 341 F. Supp. 2d at 956-58, 957 n.5 (dismissing as time barred § 1982 and § 1983 claims on the ground that no continuing violation exists here for defendants’ “passive inaction” in case brought by black property owner alleging that municipal officials denied water service to plaintiff’s planned home because of his race), *subsequent decision*, 103 F. App’x 560 (6th Cir. 2004).

421. *See, e.g.*, cases cited in SCHWEMM, *supra* note 13, § 26:5 nn.6, 8.

422. *See* 42 U.S.C. § 3613(c) (FHA); SCHWEMM, *supra* note 13, § 27:22-24 (discussing § 1982). Punitive damages are not available against municipal defendants under § 1983. *See infra* note 425 and accompanying text.

423. *See, e.g.*, *Kennedy*, 505 F. Supp. 2d at 499 (discussing qualified immunity as “‘good faith’ immunity”).

424. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 806-08, 813-19 (1982). Local legislators have absolute immunity from § 1983 damage claims when acting in their legislative capacity. *See* *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). However, “qualified immunity represents the norm,” *Harlow*, 457 U.S. at 807, and such “good faith” immunity would thus generally apply to zoning officials and others likely to be sued in municipal services discrimination cases. *See, e.g.*, *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 260-61 (Wash. 1998).

425. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981); *see also* *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*17 (N.D. Tex. Feb. 14, 2002) (disallowing punitive damages in § 1983 claim alleging discriminatory services by municipality based on *City of Newport*, but denying such damages under the FHA only after analyzing the

or the FHA. One possibility, however, is that § 1982 would be interpreted with similar damage limits to those of § 1983 because both statutes were passed during the post-Civil War era,<sup>426</sup> whereas the FHA, as a modern civil rights statute, was not.<sup>427</sup> Although one recent municipal services decision read the FHA as subject to both of these limitations,<sup>428</sup> this view is not well established.<sup>429</sup> If it is not followed, then the FHA could be of unique value in such cases, particularly with respect to its potential authorization of punitive damage awards against municipal defendants.

### CONCLUSION

Four decades after passage of the federal Fair Housing Act, racially segregated housing patterns remain the norm throughout the United States, a

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specific facts alleged here).

Punitive damages are also not available under Title VI of the 1964 Civil Rights Act. *See Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002).

426. *See, e.g.*, *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.*, 670 F.2d 1, 3-4 (1st Cir. 1982) (holding that municipalities' § 1983 immunity from punitive damages also applies to claims under § 1981); *cf. Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (described *supra* note 379 para. 2). *But see Phillips v. Hunter Trails Cmtys. Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) (finding it "doubtful" that municipalities' immunity from § 1983 punitive damages also applies to § 1982 claims).

427. *See, e.g.*, *Miller*, 2002 WL 230834, at \*17 (described *supra* note 425). Punitive damages are explicitly authorized in privately initiated enforcement actions under the FHA. *See* 42 U.S.C. § 3613(c)(1). Nor does the FHA explicitly provide for immunity for individual public defendants, although such immunity has been accorded to some public officials in FHA cases. *See* SCHWEMM, *supra* note 13, § 12B:5 n.19 and accompanying text.

428. *See* *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456, 492 n.21, 499-500 (S.D. Ohio 2007).

429. As to whether municipalities may be sued for punitive damages under the FHA, *compare Phillips*, 685 F.2d at 191 (affirming FHA punitive award against defendant that was assumed to be a municipality for purposes of claiming immunity from such an award), *with N.J. Coal. of Rooming & Boarding House Owners v. Mayor of Asbury Park*, 152 F.3d 217, 225 (3d Cir. 1998) (expressing doubt in FHA case that punitive damages "can be . . . awarded against" municipalities) *and Developmental Servs. of Neb. v. City of Lincoln*, 504 F. Supp. 2d 726, 738 n.20 (D. Neb. 2007) (citing *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1158 (C.D. Cal. 2001) for the proposition that the FHA "does not authorize punitive damages against municipalit[ies]"); *see also Miller*, 2002 WL 230834, at \*17 (described *supra* note 425). Regardless of how this issue is settled, it appears that civil penalties may be assessed against municipalities in a proper FHA case brought by the government. *See, e.g.*, *Smith & Lee Assocs. v. City of Taylor*, 13 F.3d 920, 933 (6th Cir. 1993); *United States v. Borough of Audubon*, 797 F. Supp. 353, 363 (D.N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992).

As to whether municipal officials sued for damages under the FHA enjoy § 1983-like immunities, some courts have held that they do, but this issue has not yet been authoritatively settled. *See* SCHWEMM, *supra* note 13, § 12B:5 nn.15-19 and accompanying text.

result that would have dismayed the FHA's original proponents. One consequence of this on-going segregation is that residents of minority neighborhoods continue to be in a position to allege that they are receiving inferior municipal services to those provided in comparable white communities. This type of claim was well known when the FHA was in its infancy and the primary bases for challenging such discrimination were thought to be the Equal Protection Clause and § 1982 of the 1866 Civil Rights Act.

The FHA soon emerged as an alternative basis for such challenges, particularly as the courts gave this statute a generous construction. The 1988 Fair Housing Amendments Act added to this momentum by, *inter alia*, providing the FHA with a much stronger set of enforcement mechanisms and directing HUD to issue substantive regulations, one of which soon identified discriminatory municipal services as being outlawed by the FHA.

In the meantime, however, the federal judiciary was becoming more hostile to civil rights claims, as a series of ever more conservative Republican presidents made good on their promises to appoint increasingly reactionary judges to the federal bench. Ultimately, the retrenchment of the federal judiciary on civil rights was reflected in two appellate decisions involving the FHA—by the Seventh Circuit in *Halprin* in 2004<sup>430</sup> and the Fifth Circuit in *Cox* in 2005<sup>431</sup>—that narrowly construed the FHA's most important provision, § 3604, as protecting only homeseekers rather than also current residents.<sup>432</sup> In *Halprin*, Judge Posner ruled that § 3604(a) and § 3604(b) did not extend to post-acquisition discrimination,<sup>433</sup> and, agreeing with *Halprin*, Judge Higginbotham in *Cox* held that neither of these provisions could be invoked by residents of a black neighborhood to challenge inferior municipal services that negatively affected the habitability of their homes.<sup>434</sup>

Focusing on the *Cox* issue of whether the FHA outlaws discriminatory municipal services, this Article has closely examined the language and legislative history of § 3604(a) and § 3604(b) and has shown that *Halprin* and *Cox* were wrong to interpret them not to apply in post-acquisition situations. In particular, § 3604(b)'s guarantee of nondiscrimination in housing-related "privileges" and "services"—even if limited to those connected with the "sale or rental of a dwelling"—should apply, as to "rentals," throughout a tenant's residency and, as to "sales," to privileges and services that are tied to homeownership.<sup>435</sup>

The latter would include fire and police protection, garbage collection, and a number of other services provided by local governments to residents based on their ownership of property in the area. This interpretation of § 3604(b), however, would not include the precise claim made by the plaintiffs in *Cox*,

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430. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004).

431. *Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005).

432. *See Cox*, 430 F.3d at 744-45; *Halprin*, 388 F.3d at 329-30.

433. *Halprin*, 388 F.3d at 330.

434. *Cox*, 430 F.3d at 744-45.

435. *See* 42 U.S.C. § 3604(b) (2000).

which was that the municipal defendant discriminatorily failed to adequately enforce its zoning laws against another property owner.<sup>436</sup>

This Article's ultimate conclusion is that, while the result in *Cox* may be defended, its analysis and that of *Halprin* are so flawed—and in particular have so misconstrued § 3604(b) of the FHA—that they should be rejected by other federal and state courts, even as they stand as an unfortunate impediment to FHA enforcement in the Fifth and Seventh Circuits for the foreseeable future.<sup>437</sup> For these other courts, the analysis offered in this Article provides a sounder approach to FHA-based claims alleging discriminatory municipal services and, more generally, to § 3604(b) claims in post-acquisition situations.

A final comment is in order. While the misguided analysis in *Halprin* and *Cox* should be rejected in favor of a broader interpretation of the FHA, the ultimate problem in *Cox*—that of inferior services being provided to predominantly minority neighborhoods—will, in my judgment, be with us long after the *Halprin-Cox* analysis has been laid to rest. The problem of discriminatory municipal services is, after all, a function of the fact that ghetto-like, one-race neighborhoods continue to exist in the face of the clear desire of the FHA's proponents to replace them with truly integrated housing patterns. Until this 1968 dream becomes a twenty-first century reality, residents of heavily minority neighborhoods will suffer in countless ways,<sup>438</sup> not the least of which is that municipal officials will continue to be tempted to under-serve these areas regardless of the threat of an FHA lawsuit.<sup>439</sup> That threat, after all, has been available under the Equal Protection Clause and § 1982 for decades, and yet lawsuits alleging discriminatory municipal services continue to be filed on a regular basis throughout the Nation. The only long-term hope for ending such discrimination is to end the prerequisite for such claims. This means, at long last, to achieve the integrated housing patterns envisioned by the FHA.

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436. *Cox*, 430 F.3d at 740.

437. See, e.g., *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, 235 F. App'x 227, 227-28 (5th Cir. 2007) (affirming dismissal of FHA claims by condominium owner "because they go to the habitability of her condominium and not the availability of housing" (citing *Cox*, 430 F.3d at 741; *Halprin*, 388 F.3d 327)).

438.

Residential segregation is not benign. It does not mean only that blacks and Hispanics, Asians and whites live in different neighborhoods with little contact between them. It means that whatever their personal circumstances, black and Hispanic families on average live at a disadvantage and raise their children in communities with fewer resources. It cannot be a surprise, then, that it is harder for them to reach their potential.

JOHN R. LOGAN, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA* 20 (2002), available at [http://www.s4.brown.edu/cen2000/SepUneq/SUReport/Separate\\_and\\_Unequal.pdf](http://www.s4.brown.edu/cen2000/SepUneq/SUReport/Separate_and_Unequal.pdf).

439. "[Americans] seem to understand, if not accept, that the opportunities and amenities available in a neighborhood, as well as the responsiveness of local government to its needs, are often closely calibrated to its racial and economic makeup." CASHIN, *supra* note 7, at xvi.



# LIMITS ON HOUSING AND NEIGHBORHOOD CHOICE: DISCRIMINATION AND SEGREGATION IN U.S. HOUSING MARKETS

MARGERY AUSTIN TURNER\*

## INTRODUCTION

When Congress passed the Fair Housing Act in 1968, America's neighborhoods were starkly segregated by race, and black families were routinely—and explicitly—denied homes and apartments in white neighborhoods. In the four decades since, we have made significant progress in combating housing discrimination, and the racial landscape of our cities and suburbs has changed dramatically. Nonetheless, blacks, Latinos, Asians, and Native Americans still experience discrimination when they search for homes and apartments, and neighborhood segregation—especially of blacks from whites—remains stubbornly high. This Article summarizes the most recent research evidence on discrimination and segregation in U.S. housing markets to describe both the progress we have achieved and the challenges that remain.

### I. HOW MUCH HOUSING DISCRIMINATION STILL OCCURS?

Since the 1960s, advocates for fair and open housing have used a technique called “paired testing” to detect and reveal discrimination by real estate and rental agents. In a paired test, two individuals—one white and the other minority—pose as equally qualified homeseekers. Both testers are carefully trained to make the same inquiries, express the same preferences, and offer the same qualifications and needs. From the perspective of the housing provider they visit, the only difference between the two is their race or ethnicity, and they should therefore receive the same information and assistance. Systematic differences in treatment—telling the minority customer that an apartment is no longer available when the white is told he could move in next month, for example—provide powerful evidence, easily understandable by juries and the general public, of discrimination that denies minorities equal access to housing.

To illustrate, the National Fair Housing Alliance recently filed lawsuits against major real estate companies in the cities and suburbs of Chicago,<sup>1</sup> Atlanta,<sup>2</sup> and Detroit.<sup>3</sup> Paired testing in these communities revealed that real estate agents showed blacks and Latinos homes in majority-minority

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1. National Fair Housing Alliance, [http://www.nationalfairhousing.org/newsArchive.php?section\\_id=23&detail\\_id=92](http://www.nationalfairhousing.org/newsArchive.php?section_id=23&detail_id=92) (last visited Mar. 21, 2008).

2. National Fair Housing Alliance, [http://www.nationalfairhousing.org/newsArchive.php?section\\_id=23&detail\\_id=93](http://www.nationalfairhousing.org/newsArchive.php?section_id=23&detail_id=93) (last visited Mar. 21, 2008).

3. National Fair Housing Alliance, [http://www.nationalfairhousing.org/newsArchive.php?section\\_id=23&detail\\_id=91](http://www.nationalfairhousing.org/newsArchive.php?section_id=23&detail_id=91) (last visited Mar. 21, 2008).

communities while showing whites homes in predominantly white communities, even though both white and minority testers could afford comparable prices and asked about neighborhoods near their work. In addition, agents made disparaging comments to white homebuyers about minorities and minority communities.<sup>4</sup>

When a large number of consistent and comparable tests are conducted for a representative sample of real estate or rental agents, the results control for differences between white and minority customers, and directly measure the prevalence of discrimination across the housing market as a whole.<sup>5</sup> The Department of Housing and Urban Development (“HUD”) recognized the potential of the paired testing methodology as a research tool and has used it to monitor the incidence of housing discrimination nationwide at roughly ten year intervals. Specifically, the 1977 Housing Market Practices Study provided the first solid estimates of the prevalence of discrimination against African-American homeseekers<sup>6</sup> and helped build the case for strengthening the enforcement of federal fair housing protections in the 1988 Fair Housing Amendments Act. The 1989 Housing Discrimination Study extended those initial national estimates to cover Hispanics and concluded that overall levels of adverse treatment against African Americans had remained essentially unchanged since 1977.<sup>7</sup> Most recently, the 2000 Housing Discrimination Study (“HDS2000”) reported the change since 1989 in discrimination against African Americans and Hispanics, and up-to-date estimates of the incidence of discrimination, including the first national estimates of discrimination against Asians and Pacific Islanders and the first rigorous estimates of discrimination against Native Americans searching for housing outside of Native Lands.<sup>8</sup>

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4. National Fair Housing Alliance, <http://www.nationalfairhousing.org/index.php> (last visited Mar. 21, 2008).

5. In 2002, a methodological workshop convened by the National Research Council confirmed the potential of rigorous paired testing research, reviewed issues of statistical significance and generalizability, and identified ways in which paired testing studies could be strengthened. *See NAT'L RESEARCH COUNCIL, MEASURING HOUSING DISCRIMINATION IN A NATIONAL STUDY: REPORT OF A WORKSHOP* (Angela Williams Foster et al. eds., 2002).

6. RONALD E. WIENK ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *MEASURING RACIAL DISCRIMINATION IN HOUSING MARKETS: THE HOUSING MARKET PRACTICES STUDY* (1979).

7. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *HOUSING DISCRIMINATION STUDY: SYNTHESIS* (1991).

8. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I OF HDS2000* (2002) [hereinafter TURNER ET AL., PHASE I]; MARGERY AUSTIN TURNER & STEPHEN L. ROSS, U.S. DEP'T OF HOUS. & URBAN DEV., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 2—ASIANS AND PACIFIC ISLANDERS* [hereinafter TURNER & ROSS, PHASE 2]; MARGERY AUSTIN TURNER & STEPHEN L. ROSS, U.S. DEP'T OF HOUS. & URBAN DEV., *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 3—NATIVE AMERICANS* (2003) [hereinafter TURNER & ROSS, PHASE 3].

### A. Evidence of Progress

Between 1989 and 2000, the incidence of discrimination against African Americans declined significantly, in both rental and sales markets nationwide.<sup>9</sup> The incidence of discrimination against Hispanic homebuyers also declined, but no significant change occurred for Hispanic renters.<sup>10</sup>

More specifically, the incidence of discrimination against African-American renters declined from 26% in 1989 to 22% in 2000, while discrimination against Hispanic renters stayed essentially unchanged at 26%.<sup>11</sup> The decline in adverse treatment against black renters reflects the fact that blacks are now much more likely to be told about the same number of available units as comparable white renters, and to be able to inspect the same number of units.<sup>12</sup> Hispanics appear no better off than in 1989 on these indicators. They are now more likely than in 1989 to be quoted a higher rent compared to non-Hispanic whites when asking about the same unit.<sup>13</sup> On the other hand, agents are more likely than in 1989 to encourage Hispanics to apply by asking them to complete an application and/or make future contact.<sup>14</sup>

In metropolitan sales markets, both African Americans and Hispanics have experienced quite dramatic declines in discrimination since 1989.<sup>15</sup> Specifically, the incidence of discrimination dropped from 29% in 1989 to 17% in 2000 for African-American homebuyers and from 27% to 20% for Hispanic homebuyers.<sup>16</sup> These overall reductions in sales market discrimination reflect more complex changes in patterns of discrimination on individual treatment measures. For African Americans, the decline in adverse treatment is largest with respect to housing availability; black homebuyers are more likely to be told about the same number of available homes as whites than they were in 1989.<sup>17</sup> However, black homebuyers are also more likely to be steered to racially mixed neighborhoods (while comparable whites are steered to predominantly white neighborhoods) compared to 1989.<sup>18</sup> In other words, they may find out about just as many homes as comparable whites, but not necessarily in the same neighborhoods.

Hispanic homebuyers are also much more likely now than in 1989 to be told about and to inspect the same number of available homes as non-Hispanic

9. TURNER ET AL., PHASE I, *supra* note 8, at iv.

10. The discrimination estimates reported here are based on the share of tests in which the white tester was *consistently* favored over his or her minority partner. For a detailed discussion of how measures of discrimination are constructed and how their statistical significance is determined, see TURNER ET AL., PHASE I, *supra* note 8.

11. *Id.* at iii.

12. *Id.* at iii-iv.

13. *Id.* at 3-7.

14. *Id.* at 3-8.

15. *Id.* at iii.

16. *Id.*

17. *Id.* at 3-12.

18. *Id.*

whites.<sup>19</sup> They are also more likely to receive equal levels of follow-up contact from real estate agents.<sup>20</sup> Over the course of the 1990s, agents appear to have expanded the assistance and information about financing that they provide to white customers, but not Hispanics, leading to an increase in the level of adverse treatment experienced by Hispanics on measures of financing assistance.<sup>21</sup>

### *B. Persistence of Discrimination*

Despite the significant progress since 1989, levels of discrimination against African-American and Hispanic homeseekers remain unacceptably high. Moreover, HDS2000 shows (for the first time) that Asians and Pacific Islanders also face significant levels of adverse treatment nationwide and that Native American renters may face even higher rates of discrimination than other groups (based on evidence from three states).<sup>22</sup> Estimates of discrimination in the rental market are relatively similar across racial/ethnic groups, ranging from 29% for Native Americans to 20% for blacks. In the sales market, levels of discrimination are somewhat lower, but still significant—ranging from 17% for African Americans to 20% for Asians.

### *C. Patterns of Discriminatory Treatment*

Although overall summary measures are useful for estimating how big the problem of discrimination is, policymakers and practitioners should focus on individual treatment measures to develop strategies for reducing discrimination. In the rental market, the most frequent form of discrimination against blacks, Hispanics, and Native Americans is denial of information about available housing units.<sup>23</sup> This is a critically important form of discrimination because it so clearly limits the options from which minority homeseekers can choose. Both blacks and Hispanics are also less likely than comparable white homeseekers to be given opportunities to actually inspect available units,<sup>24</sup> another extremely damaging form of discrimination. Asian renters, on the other hand, are just as likely as comparable whites to be able to inspect available units.

Patterns of discrimination look quite different in metropolitan sales markets. African-American homebuyers still face some discrimination with respect to information about available homes, and opportunities to inspect homes. In addition, agents steer black customers to homes in less predominantly white neighborhoods, provide less information and assistance with financing, and offer less encouragement overall.<sup>25</sup> Hispanic homebuyers also face some

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19. *Id.* at 3-16.

20. *Id.*

21. *Id.* at 3-17.

22. TURNER & ROSS, PHASE 2, *supra* note 8; TURNER & ROSS, PHASE 3, *supra* note 8.

23. TURNER ET AL., PHASE I, *supra* note 8, at Foreword; TURNER & ROSS, PHASE 3, *supra* note 8, at 4-1.

24. TURNER ET AL., PHASE I, *supra* note 8, at iii-iv.

25. *Id.* at 3-11 to -13.

discrimination with respect to information about available homes, but the major obstacle they face appears to be the lack of assistance with financing compared to equally qualified white buyers.<sup>26</sup> Finally, the incidence of discrimination against Asian homebuyers is shockingly high, including unfavorable treatment with respect to information about available homes, opportunities to inspect homes, and assistance with financing.<sup>27</sup>

The results presented here do not necessarily capture all the discrimination that may occur in the process of a housing search. HDS2000, like most paired testing studies, focused on the initial, in-person encounter between a homeseeker and a rental or sales agent.<sup>28</sup> Minorities may experience discrimination before this encounter can even occur, if they are unable to make an appointment to meet with a real estate or rental agent. A growing body of exploratory research suggests that most Americans can identify a person's race or ethnicity over the telephone with a fairly high degree of accuracy.<sup>29</sup> If this is the case, some real estate and rental agents may use telephone screening to avoid minority customers altogether. Additional incidents of adverse treatment may also occur later in the housing transaction when a renter submits an application or negotiates lease terms or when a homebuyer makes an offer on a particular unit or applies for mortgage financing.

#### *D. Mortgage Lending*

In addition to the national estimates of discrimination by real estate and rental agents, a pilot paired testing study in two metropolitan areas—Los Angeles, California and Chicago, Illinois—revealed serious problems of discrimination against blacks and Hispanics by mortgage lending institutions.<sup>30</sup> Testers posing as first-time homebuyers visited mortgage lending institutions in person to inquire about how much they could qualify to borrow and what types of products might be available to them.<sup>31</sup>

Results indicate that in both metropolitan areas, African-American and Hispanic homeseekers face a significant risk of being denied information that comparable white customers receive.<sup>32</sup> Minority homeseekers were denied basic information about how much they could afford to borrow, told about fewer loan products, offered less “coaching” about how to qualify for mortgage financing,

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26. *Id.* at 3-17.

27. TURNER & ROSS, PHASE 2, *supra* note 8, at iii-v.

28. TURNER ET AL., PHASE I, *supra* note 8, at ii-iii.

29. Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 452 (2001), available at <http://uar.sagepub.com/cgi/content/abstract/36/4/452>.

30. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS (2002).

31. *Id.* at 4-6.

32. *Id.* at 37.

and given less aggressive follow-up from loan officers.<sup>33</sup> The incidence of unfavorable treatment varied considerably across indicators, ranging from 10 to 15% of tests in which minorities were denied basic information that their white partners received, to as high as 50% of tests in which whites received more “coaching” in how to qualify for financing than their minority partners.<sup>34</sup>

To illustrate, in one test, although the white tester declined to authorize a credit check, the loan officer pre-qualified him for a maximum loan amount of \$200,000.<sup>35</sup> When the same loan officer met with a Hispanic tester, he refused to provide any information or service without first conducting a credit check.<sup>36</sup> The loan officer told the Hispanic tester, “we usually don’t meet with anyone without doing the credit check, it would be a waste of time for you and for me,” and added “you can go to other lenders; they might be able to help you without first pulling out your credit as every mortgage corporation has a different policy.”<sup>37</sup> Another loan officer pre-qualified a white tester for a home price of \$185,000 and a maximum loan amount of \$175,750 and provided a “Pre-Qualification Certificate.”<sup>38</sup> Eight days later, the same loan officer pre-qualified a comparable African-American tester for a home price of only \$165,000 to \$175,000 and a maximum loan amount of \$160,000.<sup>39</sup> The loan officer did not provide the African-American tester with a “Pre-Qualification Certificate.”<sup>40</sup>

### *E. Home Insurance*

In 1996, HUD funded an exploratory pilot study to determine whether the paired testing methodology could be effectively adapted to measure possible discrimination by home insurance providers against homes located in minority neighborhoods.<sup>41</sup> Previous research had documented that homeowners in minority neighborhoods had more difficulty obtaining home insurance, received inferior coverage, or paid more for full coverage than homeowners in white neighborhoods, but the research offered no credible evidence on the extent to which *discriminatory treatment* might be a contributing factor.<sup>42</sup> Testing for this study was conducted in three metropolitan areas, but in one of the three, the testing effort was detected by insurance providers and had to be terminated.<sup>43</sup> Interestingly, this exploratory effort did not find systematic patterns of adverse

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33. *Id.* at 36.

34. *Id.* at 25, 32.

35. *Id.* at 26.

36. *Id.*

37. *Id.*

38. *Id.* at 27.

39. *Id.*

40. *Id.*

41. DOUGLAS A. WISSOKER ET AL., TESTING FOR DISCRIMINATION IN HOME INSURANCE (1997), <http://www.urban.org/url.cfm?ID=307555&renderforprint=1>.

42. *Id.*

43. *Id.*

treatment by home insurance providers against properties in minority neighborhoods.<sup>44</sup> It did, however, raise concerns about possible disparate impacts from the rating area boundaries established by insurance companies.<sup>45</sup> In other words, white and black neighborhoods that were similar in many respects, including quality of the housing stock, homeownership rates, and income levels, were assigned by the insurance companies to different rating areas and therefore received different rate quotes.<sup>46</sup>

## II. DO AMERICANS KNOW—AND EXERCISE—THEIR FAIR HOUSING RIGHTS?

The Federal Fair Housing Act prohibits all of the discriminatory practices that paired testing has revealed in metropolitan housing markets today. But enforcement of federal fair housing protections depends primarily upon complaints from victims of discrimination. In other words, minority homes seekers have to know their fair housing rights, recognize when those rights may have been violated, and take action (with the help of a local fair housing group or a private attorney, or by going directly to HUD). Unfortunately, the evidence suggests that very few people actually do take action when they experience discrimination.

In order to assess both awareness of and support for federal fair housing protections, HUD recently commissioned two surveys of public awareness, the first in 2000/2001 with a follow-up in 2005.<sup>47</sup> The questionnaire centered around ten scenarios, each describing a set of actions by landlords, home sellers, real estate agents, or lenders, eight of which involve conduct that is prohibited under federal law.<sup>48</sup> Three scenarios describe discriminatory practices based on race or ethnicity:

[A] family is selling their house through a real estate agent. They are white, and have only white neighbors. Some of the neighbors tell the family that, if a non-white person buys the house, there would be trouble for that buyer. Not wanting to make it difficult for a buyer, the family tells the real estate agent they will sell their house only to a white buyer.

... A white family looking to buy a house goes to a real estate agent and asks about the availability of houses within their price range. Assuming the family would only want to buy in areas where white

44. *Id.*

45. *Id.*

46. *Id.*

47. MARTIN D. ABRAVANEL, U.S. DEP'T OF HOUS. & URBAN DEV., *DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW* (2006) [hereinafter ABRAVANEL, *TRENDS IN PUBLIC KNOWLEDGE*]; MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, U.S. DEP'T OF HOUS. & URBAN DEV., *HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS* (2002). [hereinafter ABRAVANEL & CUNNINGHAM, *HOW MUCH DO WE KNOW?*].

48. ABRAVANEL & CUNNINGHAM, *HOW MUCH DO WE KNOW?*, *supra* note 47, at 7.

people live, the agent decides to show them only houses in all-white neighborhoods, even though there are many houses in their price range in other parts of the community.

... An Hispanic family goes to a bank to apply for a home mortgage. The family qualifies for a mortgage but, in that bank's experience, Hispanic borrowers have been less likely than others to repay their loans. For that reason, the loan officer requires that the family make a higher down payment than would be required of other borrowers before agreeing to give the mortgage.<sup>49</sup>

Respondents were asked if they approved or disapproved of the action taken in each scenario, and whether it was legal or illegal.<sup>50</sup>

Analysis of survey responses found widespread knowledge of most federal fair housing protections, particularly those relating to race and ethnicity. Eight of ten people (81%) know that it is illegal to restrict home sales to white buyers; almost three quarters know that it is illegal for lenders to require higher downpayments based on an applicant's ethnicity (70%); and almost six of ten know that it is illegal for real estate agents to show white buyers homes only in predominantly white neighborhoods (58%).<sup>51</sup> In general, people with higher incomes and education are generally more likely to understand federal fair housing protections. In addition, both blacks and Hispanics are significantly more likely than whites to know that limiting white buyers' house searches to white neighborhoods is illegal; Hispanics are more likely than either whites or blacks to know that restricting home sales to white buyers and requiring a higher downpayment based on ethnicity are illegal.<sup>52</sup>

Most Americans also express support for federal fair housing protections. Almost nine of every ten people say that they agree with prohibitions against restricting home sales to white buyers (88%) and against requiring a higher downpayment based on ethnicity (85%).<sup>53</sup> Seven of ten say it should be illegal to show white buyers homes only in white areas (71%).<sup>54</sup> Expressed support for these three protections is high for all population sub-groups, but significantly higher among blacks and Hispanics than among whites for prohibitions against restricting home sales to white buyers and prohibitions against showing white buyers homes only in white areas.<sup>55</sup>

Despite quite widespread knowledge of and agreement with federal fair

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49. *Id.* at 9-10.

50. *Id.* at 7. The other scenarios covered protections against discrimination for families with children, disabled people, and people of differing religions. *Id.* at 7-10. This survey was administered by telephone to a nationally representative sample of 1000 adults. *Id.* at 41.

51. ABRAVANEL, TRENDS IN PUBLIC KNOWLEDGE, *supra* note 47, at 14.

52. ABRAVANEL & CUNNINGHAM, HOW MUCH DO WE KNOW?, *supra* note 47, at 12.

53. ABRAVANEL, TRENDS IN PUBLIC KNOWLEDGE, *supra* note 47, at 14.

54. *Id.* at 22.

55. *Id.*

housing protections, most people who experience discrimination fail to act.<sup>56</sup> One reason is that people may not know that they have been victims of discrimination.<sup>57</sup> The paired testing research shows that housing discrimination today is rarely overt; minority homeseekers are almost always treated courteously and are often told about some available houses or apartments.<sup>58</sup> White testers sometimes report that they were discouraged from considering particular neighborhoods because they were racially mixed or that agents expressed a preference for renting or selling to a white customer.<sup>59</sup> Minority testers almost never hear such commentary. When discrimination takes the form of politely steering minority customers away from white neighborhoods, showing some but not all of the available apartments, or providing less assistance in resolving credit problems, victims rarely know that comparable white customers receive better treatment.<sup>60</sup>

Although many instances of housing discrimination almost certainly go undetected, a substantial number of Americans believe that they have been victims of discrimination at some point in their lives. In the survey of public knowledge and attitudes discussed earlier, 17% of adults in the United States reported having experienced some form of housing discrimination.<sup>61</sup> About half of that 17% described forms of discrimination that would be prohibited under the Federal Fair Housing Act, with race or ethnicity being the most common reason given for the perceived discrimination.<sup>62</sup> One of every five African-American adults and 6% of Hispanic adults reported having experienced discrimination based on their race or ethnicity at some time in their lives.<sup>63</sup>

Even when people think they have experienced discrimination, however, few take action. Eighty percent of the adults who reported having experienced forms of federally prohibited discrimination took no action.<sup>64</sup> Moreover, among the few who did something, the most common response to perceived discrimination was to complain to the person discriminating. Only 1% of the people who believed that they experienced discrimination went to a fair housing group to seek help or file a complaint; 1% filed a complaint with a government agency; and 2%

56. *Id.* at 36.

57. *Id.*

58. NAT'L FAIR HOUS. ALLIANCE, THE CRISIS OF HOUSING SEGREGATION: 2007 FAIR HOUSING TRENDS REPORT 29 (2007), <http://www.nationalfairhousing.org/resources/newsArchive/2007%20Fair%20Housing%20Trends%20Report.pdf>.

59. *Id.* at 5.

60. The National Fair Housing Alliance estimates that at least 3.7 million instances of discrimination based on race, ethnicity, or national origin occur annually in the U.S. *Id.* at 3; see also John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 613 (2008).

61. ABRAVANEL, TRENDS IN PUBLIC KNOWLEDGE, *supra* note 47, at 30.

62. *Id.* at 31.

63. *Id.* at 34-35.

64. *Id.* at 36.

consulted a lawyer.<sup>65</sup>

Two-thirds of the people who took no action in response to perceived discrimination thought that it would not have been worth the effort (49%) or that it would not have helped (15%).<sup>66</sup> A much smaller share (11%) said they did not know how to complain.<sup>67</sup> Interestingly, when asked a more abstract question about whether they would complain if they experienced discrimination in the future, much larger shares of adults said they would take action. Specifically, four of ten adults (41%) say that they would be “very likely” to take action, and another 25% would be “somewhat likely.”<sup>68</sup> Among those who consider themselves very likely to respond, almost half (44%) said they would consult a lawyer, 26% said they would seek help or complain to a government agency, and 17% say they would go to a fair housing group.<sup>69</sup>

These findings suggest that many Americans know what actions they could take in response to discrimination and believe (in the abstract) that they would take action. Why then is the share of people who reportedly did take action in response to perceived discrimination so low? It appears that people’s expectations about the time and effort involved in filing a complaint (including the possible psychic costs) and about the likelihood of obtaining good results discourage them from taking action, even when they believe that they have been the victims of discrimination, know that they are protected under federal law, and have a reasonably good idea about where they could go for help.<sup>70</sup>

This is not to suggest that the Federal Fair Housing Act has been ineffective. Indeed, the decline in the overall incidence of discrimination against black renters and against both black and Hispanic homebuyers between 1989 and 2000 suggests that federal fair housing protections—along with public education and changing attitudes—have had a substantial impact on the behavior of real estate and rental agents. Housing providers have strong incentives to provide equal treatment to all their customers, regardless of race or ethnicity, when fair housing organizations bring suits against discriminatory real estate and rental agents based on systematic paired testing and when courts impose substantial penalties in high-profile cases. Nonetheless, the persistence of significant levels of discrimination in housing markets today and the fact that most victims are either unaware or take no action, demonstrates that federal fair housing protections are not fully effective.

### III. HOW SEGREGATED ARE OUR NEIGHBORHOODS?

For most of the twentieth century, discrimination by private real estate

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65. *See id.* These percentages may overlap because respondents could give multiple responses to the survey question about responses to perceived discrimination.

66. *Id.* at 36-37 tbl. 22.

67. *Id.* at 22.

68. *Id.* at 3.

69. *Id.* at 39.

70. *Id.* at 41-43.

agents, rental property owners, and lending institutions helped establish and sustain stark patterns of racial and ethnic segregation in urban neighborhoods across the country.<sup>71</sup> When the Federal Fair Housing Act was passed in 1968, most whites lived in neighborhoods that were almost exclusively white, while most blacks lived in majority-black areas. At that time, America's fast-growing suburbs were largely white, while its central cities were becoming increasingly black.<sup>72</sup> On a scale of zero to 100 (where 100 represents complete segregation), most large metropolitan areas—including Chicago, Milwaukee, Detroit, Boston, Indianapolis, and New York—registered levels of segregation above seventy on the dissimilarity index.<sup>73</sup>

In the decades since, levels of black-white segregation have declined across most of the country. But the decline has been slow, and levels of segregation remain high in most big urban areas—especially those where large numbers of blacks live.<sup>74</sup> The average discrimination score for the nation's major metropolitan areas has declined from 73.9% in 1980 to 65.1% in 2000, with the biggest declines occurring in metropolitan areas with the smallest black populations.<sup>75</sup> Today, more neighborhoods are shared by both whites and blacks than two decades ago, but many neighborhoods remain either predominantly white or predominantly black.<sup>76</sup>

Over the same period, America's racial and ethnic composition has changed dramatically, making the picture of residential segregation much more complex. As of 2000, the nation's population was 70% non-Hispanic white, 12.5% black, 12.5% Hispanic, and 4% Asian.<sup>77</sup> Generally, Hispanics and Asians are less segregated from non-Hispanic whites than are blacks, but their levels of segregation have risen, while black-white segregation has declined. Specifically,

71. Private sector discrimination was not the only factor. Public policy—including federal homeownership assistance, public housing, urban renewal, and exclusionary zoning and land use regulations—all played important roles in the establishment and maintenance of residential segregation. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006).

72. Douglas S. Massey & Nancy A. Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 AM. SOC. REV. 802, 803 (1987).

73. *Id.* The “dissimilarity index” essentially reflects the share of minority group members who would have to move in order to achieve complete integration (defined as the same share of minorities in every census tract). This is one of several possible measures of segregation. *Id.* at 802-25.

74. *Id.* at 803-04.

75. Again, trends are reported in the dissimilarity index. *See* John R. Logan et al., *Segregation of Minorities in the Metropolis: Two Decades of Change*, 41 DEMOGRAPHY 1 (2004).

76. LYNETTE RAWLINGS ET AL., RACE AND RESIDENCE: PROSPECTS FOR STABLE NEIGHBORHOOD INTEGRATION (2004), *available at* <http://www.urban.org/url.cfm?ID=310985>.

77. MARGERY AUSTIN TURNER & JULIE FENDERSON, THE URBAN INSTITUTE, UNDERSTANDING DIVERSE NEIGHBORHOODS IN AN ERA OF DEMOGRAPHIC CHANGE (2006), *available at* [http://www.urban.org/UploadedPDF/411358\\_diverse\\_neighborhoods.pdf](http://www.urban.org/UploadedPDF/411358_diverse_neighborhoods.pdf).

the average index of Hispanic/white segregation registered 51.6 in 2000, up slightly from 51.0 in 1980, and Asian/white segregation stood at 42.2 in 2000, also up slightly from 41.8 in 1980.<sup>78</sup>

As the nation's population becomes more diverse, it becomes more difficult to make sense out of these traditional segregation measures. The latest census data offers both encouraging and discouraging evidence regarding trends in the racial and ethnic composition of city and suburban neighborhoods.<sup>79</sup> Both city and suburban neighborhoods today exhibit more diversity—along lines of race, ethnicity, nativity, and income—than is commonly recognized. For example, more than half of all neighborhoods in the 100 largest metropolitan areas nationwide (56.6%) are home to significant numbers of whites, minorities, and immigrants, with no single racial or ethnic group dominating the minority population. Six of ten (60.8%) are mixed-income—dominated neither by households in the highest income quintiles nor by those in the lowest. And about one-third of all tracts (34.9%) exhibit substantial diversity with respect to race, ethnicity, and income.

At the same time, however, a substantial share of neighborhoods remain either *exclusive*—occupied predominantly by affluent, native-born whites—or *isolated*—occupied predominantly by lower income minorities and immigrants. Specifically, almost a quarter of all tracts in the 100 largest metro areas (23.8%) are racially and ethnically exclusive (more than 90% white), while 16.4% are economically exclusive (less than 10% low-income with high-income households predominating). Moreover, patterns of racial and ethnic exclusion coincide with economic exclusion; almost all economically exclusive neighborhoods also exclude African Americans, and most neighborhoods in which non-whites predominate are economically isolated as well.<sup>80</sup>

Between 1990 and 2000, the share of all neighborhoods in the top 100 metropolitan areas nationwide that were racially and/or ethnically diverse increased. Specifically, the share of tracts occupied exclusively by whites (less than 10% non-white) dropped from 38.1% in 1990 to 25.7% in 2000.<sup>81</sup> The biggest increase occurred among tracts that were between 10% and 50% white, with no single group dominating the non-white population.<sup>82</sup> The number of tracts of this type climbed from 18.5% of all tracts in the top 100 metropolitan areas to 24.2% between 1990 and 2000.<sup>83</sup>

The racial/ethnic composition of most tracts (73.6%) remained relatively stable over the decade, but among those that changed, most gained minorities.<sup>84</sup> Given the long history of racial segregation in the United States, many people suspect that neighborhoods which appear to be racially diverse at any given point

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78. Logan et al., *supra* note 75, at 6.

79. TURNER & FENDERSON, *supra* note 77.

80. *Id.* at 2.

81. *Id.* at 32.

82. *Id.*

83. *Id.*

84. *Id.* at 35.

in time are actually in the process of transitioning (or tipping) from one racial majority to another. In fact, however, 57.7% of majority white tracts with blacks dominating the non-white population and 54.1% of majority white tracts with Hispanics dominating remained in the same category between 1990 and 2000.<sup>85</sup> Of those that transitioned, about one-third remained majority white, but with neither blacks nor Hispanics dominating the minority population.<sup>86</sup> The remaining two-thirds became majority-minority.<sup>87</sup> And interestingly, majority white tracts where Hispanics dominated the minority population in 1990 were more likely to transition to majority-minority status by 2000 than were majority white tracts where blacks dominated.

Finally, tracts that were majority white in 1990 with neither blacks nor Hispanics dominating the minority population were the most likely to be in the same category in 2000. Almost seven of every ten tracts in this category remained the same over the decade. Among those that changed, about a third (35.6%) remained majority white but transitioned to either black or Hispanic dominance of the minority population. Another 15.6% became majority-minority with either blacks or Hispanics dominating the minority population, and 43.6% became majority-minority with neither blacks nor Hispanics dominating.<sup>88</sup>

These trends (like the recent changes in patterns of housing discrimination) paint a mixed picture. The evidence suggests that more opportunities exist today than in the recent past for whites and minorities to live together in diverse neighborhoods, but that many neighborhoods still remain either exclusive (predominantly white and affluent) or isolated (predominantly minority and poor). Moreover, many neighborhoods that are racially and ethnically diverse appear to be stable, but a substantial minority may be transitioning to majority-minority status. Thus, while there is progress in combating both housing discrimination and segregation, stubborn problems remain unresolved.

#### IV. DOES HOUSING SEGREGATION LIMIT ACCESS TO ECONOMIC OPPORTUNITY?

Residential segregation not only separates white and minority neighborhoods, but also distances minority jobseekers from areas of employment growth and opportunity. Specifically, beginning in the late 1960s, John Kain argued that the concentration of blacks in segregated central city neighborhoods limited their access to employment, as growing numbers of jobs were dispersed to predominantly white suburban locations.<sup>89</sup> In effect, this "spatial mismatch" hypothesis posits that demand for labor has shifted away from the neighborhoods where blacks are concentrated; discrimination in housing and mortgage markets

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85. *Id.* at 36.

86. *Id.*

87. *Id.*

88. *Id.* at 36-37.

89. John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q. J. ECON. 175, 196-97 (1968).

has prevented blacks from moving to where job growth exists; and information and transportation barriers make it difficult to find and retain jobs in these distant locations.<sup>90</sup> William Julius Wilson expanded on this basic hypothesis by arguing that the exodus of jobs from central city locations, combined with the persistence of residential segregation, contributed to rising unemployment among black men during the 1980s, as well as to worsening poverty and distress in black neighborhoods.<sup>91</sup>

How have recent changes in patterns of residential segregation affected the spatial mismatch problem? A recent analysis uses dissimilarity indexes (which are widely used to measure the extent of segregation between racial and ethnic groups) to quantify the spatial separation between people and jobs.<sup>92</sup> As of 2000, the dissimilarity index between population and employment is highest for African Americans (53 on a scale where 100 represents complete segregation), lower for Asians (43) and Hispanics (44), and lowest for whites (33).<sup>93</sup> During the 1990s, the index declined for blacks and Hispanics, while remaining essentially unchanged for Asians and increased slightly for whites.<sup>94</sup> These improvements appear to result primarily from changes occurring within metropolitan regions, not from people moving between regions.<sup>95</sup> The extent of mismatch remains greatest where black-white residential segregation is highest.<sup>96</sup> Reductions in spatial mismatch are associated with declines in segregation levels.

Thus, there is strong evidence that residential segregation continues to separate minorities from centers of employment opportunity and that this separation contributes to unequal employment outcomes. But the traditional image of minorities trapped in central city neighborhoods while jobs disperse to distant suburban locations is too simplistic. Today, minority workers (and especially low-skilled black workers) are still over-represented in central cities, while jobs (especially low-skill jobs) are widely dispersed throughout the suburbs. Although many minorities have gained access to suburban residential communities, these are often not the suburban jurisdictions that offer the most promising job opportunities.

Moreover, nearly half of all low-skill jobs in the white suburbs are

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90. Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUSING POL'Y DEBATE 849, 857 (1998).

91. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987). A recent review finds that most empirical studies support the spatial mismatch hypothesis. Specifically, of twenty-eight studies reviewed, twenty-one confirm the hypothesis, and the seven that reject it are methodologically flawed. Ihlanfeldt & Sjoquist, *supra* note 90, at 880.

92. See STEVEN RAPHAEL & MICHAEL A. STOLL, BROOKINGS INST., *MODEST PROGRESS: THE NARROWING SPATIAL MISMATCH BETWEEN BLACKS AND JOBS IN THE 1990S*, at 1 (2002).

93. *Id.* at 3.

94. *Id.* at 4-5.

95. *Id.* at 7-8.

96. *Id.* at 6.

inaccessible by public transportation, making it particularly difficult for minority residents of other sub-areas to reach them.<sup>97</sup> Not surprisingly, therefore, the race or ethnicity of new hires into low-skill jobs generally matches the racial composition of the area where jobs are located.<sup>98</sup> Black workers in particular are under-represented in jobs that are located in predominantly white suburban communities.<sup>99</sup> In addition, ratios of low-skilled jobs to less-educated people are consistently lowest in black and Hispanic areas and highest in the white suburbs. Although jobs in the central business district may be accessible for workers of all races and ethnicities, these jobs tend to be highly competitive and may require higher skills.<sup>100</sup> Thus, residential segregation continues to put considerable distance between minority workers—especially African Americans—and areas of greatest employment opportunity.

Residential segregation also contributes to minorities' unequal educational attainment, and hence to their disadvantaged position in the evolving labor market.<sup>101</sup> Black high school graduation rates, employment rates, and wages are all negatively associated with the level of black-white segregation in a city.<sup>102</sup> Other things being equal, high levels of segregation have been shown to increase high school drop-out rates among blacks, reduce employment among blacks (while increasing the white employment rate), and widen the gap between black and white wages.<sup>103</sup> Research indicates that public school desegregation plans of the 1970s reduced high school majority-minority rates among blacks by between one and three percentage points (half of the total decline achieved during the decade), while having no effect on majority-minority rates among whites.<sup>104</sup>

What is it about racial segregation that undermines the educational attainment, skills, and qualifications of minorities? The effects are most obvious—and most severe—in distressed central city neighborhoods where many low-income minorities are concentrated.<sup>105</sup> Many of these neighborhoods are served by failing public schools with high drop-out rates, low instructional

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97. Michael A. Stoll et al., *Within Cities and Suburbs: Racial Residential Concentration and the Spatial Distribution of Employment Opportunities Across Sub-Metropolitan Areas*, 19 POL'Y ANALYSIS & MGMT. 207, 225-27 (2000).

98. *Id.*

99. *Id.*

100. See Harry J. Holzer, *Racial Differences in Labor Market Outcomes Among Men*, in 2 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 98 (Neil J. Smelser et al. eds., 2001).

101. David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q. J. ECON. 827, 841-47 (1997).

102. *Id.*

103. *Id.*

104. See Jonathan Guryan, *Desegregation and Black Dropout Rates* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8345, 2001), available at <http://www.nber.org/papers/w8345.pdf>.

105. See Massey & Denton, *supra* note 72 (to understand how residential segregation led to the concentration of minority poverty).

quality, and poor test scores.<sup>106</sup> Black and Hispanic children attending these schools are at a tremendous disadvantage, even if they stay in school and work hard.

In addition, other conditions typical of distressed central city neighborhoods undermine their chances of succeeding academically and attaining the skills necessary to compete effectively in today's labor markets. In particular, peer pressure plays a critical role in shaping the choices of young people. If many of their friends and neighbors are uninterested in school or engaging in crime and other dangerous behaviors, teenagers will be more apt to see these activities as acceptable, even fashionable, behavior. Considerable research finds that teens from high poverty and distressed neighborhoods are less successful in school than their counterparts from more affluent communities. They earn lower grades, are more likely to drop out, and are less likely to go on to college.<sup>107</sup> Kids from poor neighborhoods are also less likely to get jobs during and immediately after high school. Finally, young people who live in high crime areas are more likely to commit crimes themselves.<sup>108</sup>

The effects of residential segregation on educational achievement, however, are not limited to distressed central city neighborhoods. Growing up in the segregated suburbs can also undermine the potential of minority young people, though in more subtle ways. Minority neighborhoods generally have lower house values compared to white neighborhoods, and consequently, a lower property tax base from which to fund public schools.<sup>109</sup> Moreover, public school performance in minority suburban communities typically falls considerably short of the standard expected of schools in white suburbs.<sup>110</sup> In fact, a panel study

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106. Katherine M. O'Regan & John M. Quigley, *Spatial Effects Upon Employment Outcomes: The Case of New Jersey Teenagers*, NEW ENG. ECON. REV., May-June 1996, at 41.

107. See, e.g., ANN C. CASE & LAWRENCE F. KATZ, THE COMPANY YOU KEEP: THE EFFECTS OF FAMILY AND NEIGHBORHOOD ON DISADVANTAGED YOUTH (1992); REBECCA L. CLARK, NEIGHBORHOOD EFFECTS OF DROPPING OUT OF SCHOOL AMONG TEENAGE BOYS (1992) (on file with Armed Forces Medical Library); Daniel Aaronson, *Sibling Estimates of Neighborhood Effects*, in 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS 80 (Jeanne Brooks-Gunn et al. eds., 1997); Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353 (1993); Jonathan Crane, *The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 AM. J. SOC. 1226, 1235-42 (1991); James P. Connell & Bonnie Halpern-Felsher, *How Neighborhoods Affect Educational Outcomes in Middle Childhood and Adolescence: Conceptual Issues and an Empirical Example*, in 1 NEIGHBORHOOD POVERTY: CONTEXT AND CONSEQUENCES FOR CHILDREN 174 (Jeanne Brooks-Gunn et al. eds., 1997); Greg J. Duncan et al., *Conceptual and Methodological Issues in Estimating Causal Effects of Neighborhoods and Family Conditions on Individual Development*, in 1 NEIGHBORHOOD POVERTY: CONTEXT AND CONSEQUENCES FOR CHILDREN 219 (Jeanne Brooks-Gunn et al. eds., 1997).

108. CASE & KATZ, *supra* note 107, at 3.

109. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

110. See SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE

examining Texas public school students finds that the achievement of black students declines significantly as the percentage of blacks in their schools rises.<sup>111</sup>

#### V. NEXT STEPS TOWARD OPEN AND INCLUSIVE NEIGHBORHOODS

Our nation has made important progress over the last forty years toward the goals of free and fair housing choices as well as open and inclusive neighborhoods, but we still have a long way to go. Discrimination persists, limiting the choices for minority homeseekers and making their housing search more difficult and costly, and neighborhood segregation remains stubbornly high, limiting opportunities for minorities to share fully in our nation's social and economic opportunities.

Research strongly suggests that Americans want more residential integration than we are getting. A substantial majority of whites say they would be comfortable living in a neighborhood that is more than 20% black, and more than half say they would be comfortable in neighborhoods that are more than one third black.<sup>112</sup> When asked to choose the racial mix they would most prefer, most blacks select a neighborhood that is roughly half white and half black, but most would be willing to move into a neighborhood with a larger share of whites in order to obtain high quality, affordable housing.<sup>113</sup>

If Americans would prefer to live in more racially mixed neighborhoods, why does residential segregation remain at such stubbornly high levels? Today, neighborhoods that are predominantly white or predominantly minority tend to stay that way *not* because minorities are explicitly excluded from white neighborhoods. Instead, multiple factors combine to sustain segregation and undermine the stability of the mixed neighborhoods many Americans would prefer. One of these factors is the disparity between whites and minorities in incomes and wealth. Whites on average have higher incomes and wealth, due in part to past patterns of discrimination and segregation, and can afford to live in neighborhoods that are out of reach for many minorities. Economic differences, however, do not account for most of the residential segregation that remains today; if households were distributed across neighborhoods entirely on the basis of income rather than race or ethnicity, levels of segregation would be dramatically lower.<sup>114</sup>

Some people argue that neighborhood segregation today is really a matter of choice—that minorities prefer to live in neighborhoods where their own race or

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UNDERMINING THE AMERICAN DREAM 141-47, 193-96, 202-36 (2004).

111. Eric A. Hanushek et al., *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* 22-27 (Nat'l Bureau of Econ. Research, Working Paper No. 8741, 2002), available at [www.nber.org/papers/w8741.pdf](http://www.nber.org/papers/w8741.pdf).

112. Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763, 781 (1997).

113. *Id.* at 786-91.

114. See Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 176-81 (2003).

ethnicity predominates and therefore choose not to move to white neighborhoods. Indeed, the evidence suggests that the average black person's ideal neighborhood has more blacks compared to the average white person's ideal; most blacks would prefer to live in neighborhoods where their own race accounts for about half the population, rather than 20% to 30%.<sup>115</sup> Thus, when minority homeseekers "choose" a more predominantly minority neighborhood, it may actually be because their information was limited by discrimination, or because they felt unwelcome in the more predominantly white neighborhoods they visited.<sup>116</sup>

Finally, considerable evidence suggests that the fears of white people perpetuate neighborhood segregation, despite the fact that a majority of whites say they want to live in more mixed neighborhoods. Specifically, many white people fear that an influx of minorities into their neighborhood will inevitably lead to a downward spiral of declining property values, rising crime, and white flight. These fears cause them to flee, precipitating the downward spiral they feared and concurrently reinforcing a self-fulfilling prophecy about racial tipping. Similarly, whites avoid moving into neighborhoods that they perceive are becoming increasingly mixed because they fear an influx of more minorities, declining property values, and rising crime. This avoidance by whites of neighborhoods that appear attractive to minority homeseekers results in resegregation and reinforces expectations about racial tipping.<sup>117</sup>

Given the complexity—and subtlety—of the processes sustaining residential segregation in urban America today, how should policymakers respond? The evidence argues for a three-pronged strategy: (1) enforcement—to combat persistent discrimination; (2) education—about the availability and desirability of diverse neighborhoods; and (3) incentives—to encourage and nurture residential diversity. Each of these three components is essential to achieving the full potential of the other two.

The vigor of federal fair housing enforcement has waxed and waned over the last four decades, but has consistently relied too heavily on complaints from victims of discrimination as the trigger for investigation and action. Discrimination today is hard to detect, so much of it goes unrecognized. When homeseekers do suspect discrimination, most feel that taking action is not worth the time and effort it would require. The federal government should provide more funding to support proactive paired testing of real estate agents, rental housing providers, lending institutions, mortgage brokers, and insurance companies in city and suburban communities across the country. This kind of

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115. Marian Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937, 949, 969 (2002).

116. *Id.* at 969-70.

117. See Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 45, 63, 73-76 (Xavier de Sousa Briggs ed., 2005); Charles, *supra* note 114; Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750, 776-77 (1994).

testing does not have to meet the scientific standards of research studies, but it should be thoughtfully designed and targeted, and responsibly implemented to detect discrimination that may be prevalent in particular neighborhoods, rental complexes, or companies. Pro-active testing can reveal discriminatory practices that would otherwise go unpunished. Moreover, when housing providers know that testing is ongoing, they are more likely to comply with the law.

Enforcement alone is not enough; discrimination is no longer the primary barrier to residential mixing. In most metropolitan areas today, a substantial number of neighborhoods, at a range of income levels, are racially and ethnically diverse. However, many homeseekers—both minority and white—are likely to be more familiar with neighborhoods where their race predominates and may be doubtful about the viability or openness of more diverse communities. A public education campaign, potentially in conjunction with an easily accessible information clearinghouse highlighting the existence and assets of racially diverse neighborhoods, could help overcome fears and stereotypes among both minority and white homeseekers. This kind of public information effort could be conducted by a local fair housing organization or by a metropolitan housing counseling center, using a local Community Development Block Grant (“CDBG”)<sup>118</sup> or supplemental Fair Housing Initiatives Program (“FHIP”) funding.

The third essential prong in a meaningful fair housing strategy for the twenty-first century requires explicit incentives that encourage both minority and white homeseekers to make pro-integrative moves and also nurture the viability and stability of diverse neighborhoods. Examples of such incentives include: enhanced downpayment assistance or low-interest loans for homebuyers who move to a neighborhood where their race or ethnicity does not predominate; equity insurance programs that guarantee homeowners in diversifying neighborhoods a reasonable sales price in the future if they remain in their homes today; and targeted enhancements to school quality, police protection, streetscapes, or parks and recreational facilities in neighborhoods that are racially or ethnically mixed. These types of incentives and investments are needed to short-circuit the self-fulfilling prophecy of racial tipping and disinvestment that currently undermines the stability of diverse neighborhoods. However, they could generate political opposition, and should therefore be carefully framed to make it clear that no homeseeker is required to make a pro-integrative move and that whites and minorities alike can qualify for a “bonus” if and when they choose diversity.

The last four decades have witnessed substantial victories in the battle against housing discrimination and residential segregation. Today, however, discrimination continues to limit choices for people of color, and too many of us

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118. The federal government currently requires jurisdictions that receive CDBG funds to conduct an analysis of impediments to fair housing and to fund activities that address these impediments. U.S. DEP’T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE (1996), <http://www.hud.gov/offices/fheo/images/fhpg.pdf>; U.S. Dep’t of Hous. & Urban Dev., Promoting Fair Housing, <http://www.hud.gov/offices/fheo/promotingfh.cfm> (last visited July 5, 2008).

live in neighborhoods that are less diverse and inclusive than we would prefer. Because the dynamics that sustain segregation today are complex and subtle, our strategies for overcoming them must become more nuanced and comprehensive, including continuous monitoring and stepped-up enforcement to detect and penalize discrimination, expanded information and education about the availability and vitality of inclusive neighborhoods, and explicit incentives to counteract prevailing fears and stereotypes about the instability of racially and ethnically mixed communities. The federal government should take the lead in making this three-pronged strategy a reality, providing money and leadership to support initiatives by local governments and nonprofit organizations, so that we can achieve the vision of free and fair housing choices.



